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# The Duty to Refrain: A Theory of State Accomplice Liability for Grave Crimes

Rachel López

*Thomas R. Kline School of Law, Drexel University, rel62@drexel.edu*

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Rachel López\*

# The Duty to Refrain: A Theory of State Accomplice Liability for Grave Crimes

## ABSTRACT

*In the modern era, as the cooperation between States in military and counter-terrorism efforts increases, so does the risk that a State will facilitate the grave crimes of another State through its political, military, or economic assistance. One of the most prominent recent examples is Russia's support to the Assad regime in Syria, despite the atrocities the Assad regime committed against its own people. This raises the question: What legal obligations do States have to refrain from assisting other States in committing grave international crimes?*

*This Article argues that much like there is an oft-cited responsibility to protect (R2P), which obligates States to protect the human rights of people in other countries when their own governments are unwilling or unable to do so, there is an analogous duty to refrain (D2R) from aiding and abetting other States who commit grave violations of human rights, like genocide and crimes against humanity. Drawing from existing sources of international law, this Article argues that D2R already constitutes a binding principle of international law. In addition, this Article makes a significant contribution to the current scholarship on State responsibility by exploring the factors that contribute to impunity for State complicity in international wrongdoing. The author contends that a narrower focus on State complicity in crimes that constitute violations of jus cogens norms would strengthen its enforcement.*

*The Article then concludes by proposing novel ideas for more effective enforcement of D2R through bilateral agreements and the employment of sanctioning powers of the United Nations General Assembly under the Uniting for Peace Resolution, when the Security Council, whose members are at times complicit in grave international crimes, is unwilling or unable to act.*

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\* Schell Fellow, Yale Law School, and Associate Professor, Thomas R. Kline School of Law, Drexel University. I am grateful for the thoughts and advice of Beth Van Schaack, Lea Brilmayer, Molly Land, Kristine Huskey, Harold Koh, Bruce Ackerman, Jim Silk, Taegin Reisman, and Hope Metcalf. However, all views expressed and any errors are my own.

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## I. INTRODUCTION

A close look at the most egregious examples of human rights violations in recent times reveals a common trend: most governments that perpetrate these grave crimes do not act alone.<sup>1</sup> They often have help from other countries.<sup>2</sup> The examples are numerous. During the Cold War, the United States provided military aid, equipment, and training to the Guatemalan government, despite the mounting evidence of crimes against humanity and genocide reported by the Central Intelligence Agency and U.S. Department of State.<sup>3</sup> China continued to pro-

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1. MILES JACKSON, *COMPLICITY IN INTERNATIONAL LAW* 221 (2015).

2. *Id.*

3. Through Freedom of Information Act requests, the National Security Archive obtained numerous government documents that demonstrate the United States' knowledge of numerous massacres and extrajudicial killings perpetrated by the Guatemalan government. To view the Central Intelligence Agency and U.S. De-

vide arms to the Sudanese government, even with the knowledge that Sudan would likely use them to perpetrate atrocities in Darfur.<sup>4</sup> Russia has continued to provide military support to the Assad regime in Syria, despite its widely condemned air strikes in Aleppo and likely use of chemical weapons against its own people.<sup>5</sup> The United States, the United Kingdom, and France have all provided logistical support and intelligence to a Saudi-led coalition whose airstrikes have killed numerous civilians.<sup>6</sup> What legal responsibility do these supporting countries bear for the crimes of their allies? Are there affirmative norms in international law that require States to refrain from providing assistance to other States if they know that it will be used to commit human rights abuses? Most critically, how do we punish State accomplices that aid and abet other States in committing mass atrocities?

This Article asserts that much like there is an emergent responsibility to protect (R2P) the human rights of another country's people when that country is unable or unwilling to do so, States also have, what I term, a duty to refrain (D2R) from assisting other States in their commission of grave crimes. Essentially, if States have a duty to act in order to prevent grave international crimes, then *a fortiori* they must also have a duty to refrain from assisting other countries in committing grave international crimes that violate *jus cogens* norms.

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partment of State cables, see Kate Doyle & Carlos Osorio, *U.S. Policy in Guatemala, 1966-1996*, THE NAT'L SECURITY ARCHIVE, <http://nsarchive.gwu.edu/NSAEBB/NSAEBB11/docs> [https://perma.unl.edu/WZH7-V7HS]; see also Santiago Wills, *Did Reagan Finance Genocide in Guatemala?*, ABC NEWS (May 14, 2013), [http://abcnews.go.com/ABC\\_Univision/News/ronald-reagan-finance-genocide-guatemala/story?id=19179627](http://abcnews.go.com/ABC_Univision/News/ronald-reagan-finance-genocide-guatemala/story?id=19179627) [https://perma.unl.edu/V5A9-WM4B] (explaining the United States' involvement in the genocide in Guatemala between 1982 and 1983). U.S. President Bill Clinton has apologized for the United States' role in these gross human rights violations, not only in Guatemala but also in Rwanda and Greece. HELMUT PHILIPP AUST, *COMPLICITY AND THE LAW OF STATE RESPONSIBILITY* 104 (2011).

4. AMNESTY INTERNATIONAL, *NO END TO VIOLENCE IN DARFUR: ARMS SUPPLIES CONTINUE DESPITE ONGOING HUMAN RIGHTS VIOLATIONS* (2012); Hilary Andersson, *China 'Is Fuelling War in Darfur,'* BBC (July 13, 2008), <http://news.bbc.co.uk/2/hi/africa/7503428.stm> [https://perma.unl.edu/U386-4HTZ].
5. *Syria Conflict: France Wants Russia on War Crimes Charges*, BBC (Oct. 10, 2016), <http://www.bbc.com/news/world-europe-37611151> [https://perma.unl.edu/MVK3-Y68Y]; *Tillerson Draws Line in the Sand over Russia's Support of Assad Regime*, ABC NEWS (Apr. 11, 2017), <http://abcnews.go.com/International/tillerson-assads-reign-syria-coming-end/story?id=46723724> [https://perma.unl.edu/HS24-Y4CU].
6. *Yemen Crisis: Who Is Fighting Who?*, BBC (Jan. 30, 2018), <http://www.bbc.com/news/world-middle-east-29319423> [https://perma.unl.edu/4ZCF-ZQWD]; see also *Yemen Events of 2016*, HUM. RIGHTS WATCH, (2017), <https://www.hrw.org/world-report/2017/country-chapters/yemen> [https://perma.unl.edu/5EUF-63JJ] ("[A]s of October 10, [2016,] at least 4,125 civilians had been killed and 7,207 wounded since the start of the campaign . . .").

While much scholarship has been devoted to R2P, it has barely touched on D2R. Over the last couple of years, legal scholars have become increasingly interested in the liability that attaches anytime a State is complicit in the wrongful conduct of other States.<sup>7</sup> However, the scholarship has focused on the more general rule, which prohibits States from assisting other States in acts that violate international law.<sup>8</sup> Yet, the scope of this rule is so broad that the contours of this general responsibility are murky. Moreover, the level of generality of the rule complicates its enforcement, a topic that has hardly been touched in the emergent literature.

In this Article, I articulate a more specific and well-defined duty to refrain from assisting in the violation of non-derogable *jus cogens* norms, such as the universal prohibitions on crimes against humanity, war crimes, genocide, slavery, and torture. While others have explored individual complicity under international criminal law and State responsibility for non-state actors, this Article focuses squarely on State complicity in the grave crimes of other States.<sup>9</sup> I urge legal scholars and policymakers to turn their sights to D2R as an effective complement to R2P.

This Article proceeds in six parts. In Part II, I define what D2R is and what D2R is not. In Part III, I lay out all of the legal sources that establish D2R as an emerging principle in international law. In Part IV, I argue that scholars have too readily focused on R2P, while overlooking the potential that a well-grounded D2R rule could have in curbing mass atrocities. While intervention by other States or the Security Council can escalate conflict, requiring States to refrain from assisting other State perpetrators decreases the resources at their disposal to perpetuate violence. I further argue that D2R is a logical com-

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7. In 2015, the American Society of International Law (ASIL) hosted a panel on complicity under international law that touched on State complicity. For more information on the ASIL panel, see R. Carter Par  t, *Complicity in International Law*, AM. SOC'Y INT'L L. (Apr. 10, 2015, 3:02 PM), <https://www.asil.org/blogs/complicity-international-law>. The European Journal of International Law (EJIL) hosted two online symposia in the last two years. See, e.g., Helen McDermott, *Book Discussion on Miles Jackson's "Complicity in International Law,"* EJIL: TALK! (Apr. 11, 2017), <https://www.ejiltalk.org/book-discussion-introducing-miles-jacksons-complicity-in-international-law/> [<https://perma.unl.edu/QB6H-Q9NS>] (highlighting the details of the discussion).

8. Int'l Law Comm'n, Draft Articles on Responsibility of States for Internationally Wrongful Acts, with Commentaries, art. 16, Rep. of the Int'l Law Comm'n on the Work of Its Fifty-Third Session, U.N. Doc. A/56/10 (2001) [hereinafter Draft Articles].

9. Oona Hathaway and others explore the contours of State responsibility for aiding and abetting non-state actors. Oona Hathaway et al., *Ensuring Responsibility: Common Article 1 and State Responsibility for Non-State Actors*, 95 TEX. L. REV. 539 (2017); MARINA AKSENOVA, *COMPLICITY IN INTERNATIONAL CRIMINAL LAW* (2016) (exploring the development of complicity as a theory of liability in international criminal law).

plement to R2P and explain how it overcomes some of the critiques leveled at R2P. Part V identifies the various obstacles to enforcing the general rule against State complicity in the wrongdoing of other States and explores how a more narrowly tailored focus on D2R would overcome some of these obstacles. Part VI proposes additional ways to enhance enforcement of State complicity in grave crimes through bilateral agreements and the sanctioning powers of the U.N. General Assembly pursuant to the United for Peace Resolution. Part VII concludes.

## II. THE DUTY TO REFRAIN

### A. Defining D2R

The need to address State complicity in grave crimes has increased urgency in the modern era, as the cooperation between States in armed conflict and counter-terrorism efforts becomes more common.<sup>10</sup> As joint endeavors between States grow, so does the possibility that a State will facilitate the grave crimes of other States through the provision of political, military, or economic aid. Indeed, in recent history, there are many notable examples of international wrongdoing by States carried out with the support of other States.<sup>11</sup> This is not terribly surprising. Most grave international crimes, particularly those involving mass atrocities, require extensive planning, broad coordination, and pooling of resources—such as weaponry and henchmen—that often cross borders. At the same time, States have frequently been reticent to put their own “boots on the ground”<sup>12</sup> in crisis situations. Consequently, States, reluctant to enmesh themselves in messy armed conflicts, have incentives to facilitate the acts of other States whose geopolitical interests align with their own. In some instances, the commission of mass atrocities would not have been possible without this external support. This reality raises a broader question: Should States be permitted to facilitate the commission of grave crimes by assisting another State actor?

The International Law Commission (ILC) has concluded that one should not be able to “do by another what [one] cannot do by [one-

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10. HARRIET MOYNIHAN, *AIDING AND ASSISTING: CHALLENGES IN ARMED CONFLICT AND COUNTERTERRORISM* 3 (2016); Brian Finucane, *Partners and Legal Pitfalls*, 92 INT'L L. STUD. 407, 430–31 (2016); Georg Nolte & Helmut Philipp Aust, *Equivocal Helpers—Complicit States, Mixed Messages, and International Law*, 58 INT'L & COMP. L.Q. 1, 1 (2009).

11. AUST, *supra* note 3, at 105.

12. *See, e.g.*, Karoun Demirjian, *Boots on the Ground in Syria Have Lawmakers Calling for a New AUMF*, WASH. POST (Nov. 1, 2015), [https://www.washingtonpost.com/news/powerpost/wp/2015/11/01/boots-on-the-ground-in-syria-has-lawmakers-calling-for-a-new-aumf/?utm\\_term=.c32e6140ec13](https://www.washingtonpost.com/news/powerpost/wp/2015/11/01/boots-on-the-ground-in-syria-has-lawmakers-calling-for-a-new-aumf/?utm_term=.c32e6140ec13) [https://perma.unl.edu/X2D2-NUW4] (“Many lawmakers want to keep combat troops out of Syria at all costs.”).

self].”<sup>13</sup> Accordingly, as I will describe more fully below, the ILC has outlined a general rule on State complicity in the Articles on Responsibility of States for Internationally Wrongful Acts (ARSIWA).<sup>14</sup> Complicity, as it is commonly understood, is “an actor’s participation in wrongdoing committed by another actor.”<sup>15</sup> In criminal law, it is a form of secondary participation, in which the accomplice does not directly perpetrate the crime, but rather, promotes or facilitates the commission of a crime by planning, instigating, ordering, or aiding and abetting.<sup>16</sup> Similarly, State complicity occurs when a State facilitates another State’s commission of an internationally wrongful act, but does not participate in the act itself.<sup>17</sup> All of the rules on State complicity form what legal scholar Helmut Philipp Aust has labeled “a network of rules.”<sup>18</sup>

The D2R obligation that I propose is a subset of this broader rule on State complicity and only addresses crimes that violate non-derogable *jus cogens* norms. As defined by Article 53 of the Vienna Convention on the Law of Treaties, *jus cogens* norms—also called peremptory norms—are those that are “accepted and recognized by the international community of States as a whole as a norm from which no derogation is permitted.”<sup>19</sup> While the Vienna Convention does not delineate which norms rise to the level of *jus cogens* norms, there is general consensus that *jus cogens* norms include the prohibitions against genocide, crimes against humanity, aggression, slavery, and torture.<sup>20</sup> These crimes violate *jus cogens* norms because they implicate the common interests of the international community, threaten peace and security of all humankind, and shock the conscience.<sup>21</sup> Because of their gravity, States have a heightened duty to ensure that they abide by *jus cogens* norms.<sup>22</sup>

D2R is a logical outgrowth of *jus cogens* norms. Under international law, States may not legitimize—by consent, acquiescence, or

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13. Draft Articles, *supra* note 8, art. 16, cmt. 6, at 66.

14. *Id.* art. 16.

15. JACKSON, *supra* note 1, at 10.

16. AKSENOVA, *supra* note 9, at 87–88.

17. John Quigley, *Complicity in International Law: A New Direction in the Law of State Responsibility*, 57 BRIT. Y.B. INT’L L. 78, 80 (1986).

18. AUST, *supra* note 3, at 376 (citation omitted).

19. Vienna Convention on the Law of Treaties, art. 53, May 23, 1969, 1155 U.N.T.S. 331, 336 [hereinafter Vienna Convention].

20. JACKSON, *supra* note 1, at 173 (citing Eric Suy, *Article 53—Treaties Conflicting with a Peremptory Norm of General International Law* (‘*jus cogens*’) in 2 THE VIENNA CONVENTION ON THE LAW OF TREATIES: A COMMENTARY (Oliver Corten & Pierre Klein eds., 2011)); Draft Articles, *supra* note 8, art. 40, cmt. 4, at 112; VAUGHAN LOWE, INTERNATIONAL LAW 58–60 (2007).

21. M. Cherif Bassiouni, *International Crimes: Jus Cogens and Obligatio Erga Omnes*, 59 LAW & CONTEMP. PROBS. 63, 69 (1997).

22. AUST, *supra* note 3, at 319–20.

recognition—any act that is contrary to *jus cogens* norms.<sup>23</sup> By logical extension, States should also not be permitted to aid other States in their violations of *jus cogens* norms. Indeed, when *jus cogens* norms are impacted, States have a heightened duty to refrain from acts that facilitate their allies' wrongdoing.<sup>24</sup> Thus, actions that conflict with D2R principles ought to be subject to stricter standards than the general rule on State complicity provides. For example, since any treaty that conflicts with a *jus cogen* norm is void by law, any foreign aid agreement that facilitates another State's violations of *jus cogens* norms should be void.<sup>25</sup> In addition, since statutes of limitations do not apply to crimes that constitute violations of *jus cogens* norms, there should similarly be no statute of limitations for violations of D2R.<sup>26</sup>

As will be discussed in more detail in Part VI, a narrower focus on D2R is also advantageous because it provides more paths to enforcement than the general rule on State complicity. First, D2R broadens the scope of situations where legal consequences can flow from State complicity. Generally, in order for an injured State to invoke the responsibility for another State, the State wrongdoer must have breached a binding legal obligation.<sup>27</sup> In the case of State complicity, there are two breaching States: the principal perpetrator State and the assisting State.<sup>28</sup> So for legal consequences to arise from a complicit act, the injured State, the State perpetrator, and the complicit State must all have been bound by the same legal obligation.<sup>29</sup> State complicity involving *jus cogens* violations are less likely to escape punishment because States do not need to consent to them in order to be bound by them.<sup>30</sup> All States are obligated not to be complicit in *jus cogens* violations. In short, D2R violations are always illegal.

Second, D2R violations present greater opportunities for enforcement because all States have a legal interest in enforcing them. This is because *jus cogens* norms implicate obligations *erga omnes*.<sup>31</sup> Obli-

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23. OPPENHEIM'S INTERNATIONAL LAW 7–8 (Robert Jennings & Arthur Watts eds., 1992).

24. AUST, *supra* note 3, at 373.

25. Vienna Convention, *supra* note 19.

26. Bassiouni, *supra* note 21, at 65–66.

27. Draft Articles, *supra* note 8, art. 42; *see also* VLADYSLAV LANOVY, COMPLICITY AND ITS LIMITS IN THE LAW OF INTERNATIONAL RESPONSIBILITY 289 (2016) (explaining that a State's responsibility for complicity ought to arise when the State wrongdoer breaches an international obligation).

28. JACKSON, *supra* note 1, at 139 (“Responsibility arises for the complicit [S]tate only where the principal [S]tate actually perpetrates an act of aggression against a third [S]tate—without the principal's wrongful act, there is nothing for the complicit [S]tate to be complicit in.”).

29. LANOVY, *supra* note 27, at 289.

30. JACKSON, *supra* note 1, at 162.

31. *Id.* at 73.



gations *erga omnes* are those duties owed “to the international community as a whole” because they involve issues that concern all States, such as the maintenance of peace and security, the protection of human rights, and the preservation of the environment.<sup>32</sup> Due to the nature of these obligations, all States—even those unharmed by the wrongful act—have an interest in upholding them and can invoke the breach of an obligation *erga omnes* as a basis for various countermeasures.<sup>33</sup>

These countermeasures could take a variety of forms. Institutional enforcement is one possibility. For example, a serious breach of an obligation *erga omnes* could result in the suspension of a State’s membership in an international organization.<sup>34</sup> Individual States are also permitted to take countermeasures acting alone. These can include suspending trade, removing diplomatic privileges or expelling certain diplomats from the offending State, freezing assets of the offending State, or prohibiting use of airspace or landing rights.<sup>35</sup>

## B. What D2R Is Not

Before we examine the many sources of law that evince the prohibition on States from assisting other States in the commission of grave crimes, it is important to set out what State complicity is not. State complicity does not occur when States act jointly to commit an international wrong; separate rules of State responsibility govern these actions.<sup>36</sup> So, for example, when Saudi Arabia and other countries jointly participate in airstrikes that indiscriminately kill civilians in Yemen, they are liable for civilian deaths, not because of D2R, but because they directly participated in the acts. On the other hand, the United States and the United Kingdom, two countries that provided

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32. In dictum in the *Barcelona Traction* case, the ICJ made a distinction between the obligations that States owe to the international community as a whole (obligations *erga omnes*) and those owed to a specific State because of a particular relationship with that State (often via a treaty or bilateral agreement) or other circumstances involving that State. The ICJ explained that because of the importance of obligations *erga omnes*, “all States can be held to have a legal interest in their protection.” *Barcelona Traction, Light & Power Co. (Belg. v. Spain)*, Second Phase, 1970 I.C.J. Rep. 3, 32, ¶ 33–34 (Feb. 5); see also Draft Articles, *supra* note 8, pt. II, ch. III, at ¶ 7 (explaining that a State’s obligations owed to “the international community as a whole all concern obligations which, it is generally accepted, arise under peremptory norms of general international law” (internal citation omitted)).

33. *Id.*; see LANOVY, *supra* note 27, at 292.

34. *Id.*

35. *Id.* at 296.

36. Article 47 of the Draft Articles governs this conduct. JACKSON, *supra* note 1, at 170 (citing Draft Articles, *supra* note 8, art. 47, at 124; Vaughan Lowe, *Responsibility for the Conduct of Other States*, JAPANESE J. INT’L L. 1, 10–11 (2002)).

intelligence and logistical support to the Saudi-led coalition, might be liable under D2R if they did so knowingly.

Nor is D2R in play when another actor commits crimes under the direction or control of another State.<sup>37</sup> Complicity is distinct from vicarious liability, in which a State is responsible because the wrongful acts were committed by its agent.<sup>38</sup> So, when Hezbollah—an organization many believe to be a proxy for Iran—commits atrocities, Iran is not responsible under D2R.<sup>39</sup> Instead, these crimes implicate the doctrine of attribution, which requires that the assisting State exert such a high level of influence that the State essentially controls the actor that is responsible for the wrongdoing.<sup>40</sup> States rarely exercise this level of control over other States and even when they do, it is very difficult to prove.

State complicity is different. Although State complicity derives from the wrongdoing of the principal perpetrator, it is an independent, separate wrong from the principal wrongful act.<sup>41</sup> While complicit State actors may not exercise direct control over the countries they assist, their assistance facilitates the grave crimes of other State perpetrators.<sup>42</sup>

### III. THE SOURCES OF D2R

In the following sections, I set out the existing sources of international law that establish D2R as a binding principle of international

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37. Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosn. & Herz. v. Serb. & Montenegro), Judgment, 2007 I.C.J. 43, ¶ 419, at 177–78 (Feb. 2007) [hereinafter *Bosnian Genocide Case*] (“[T]he question of ‘complicity’ is to be distinguished from the question, already considered and answered in the negative, whether the perpetrators of the acts of genocide committed in Srebrenica acted on the instructions of or under the direction or effective control of the organs of the FRY.”). Article 8 of the Draft Articles on State Responsibility provides the following: “The conduct of a person or group of persons shall be considered an act of a State under international law if the person or group of persons is in fact acting on the instruction of, or under the control of, that State in carrying out the conduct.” Draft Articles, *supra* note 8, art. 8, at 47.

38. Quigley, *supra* note 17, at 80.

39. See, e.g., Ben Hubbard, *Iran Out to Remake Mideast with Arab Enforcer: Hezbollah*, N.Y. TIMES (August 17, 2017), <https://www.nytimes.com/2017/08/27/world/middleeast/hezbollah-iran-syria-israel-lebanon.html>; Saleha Mohsin, *U.S. Broadens Sanctions Against Hezbollah, Iran’s Primary Proxy*, BLOOMBERG (Feb. 2, 2018), <https://www.bloomberg.com/news/articles/2018-02-02/u-s-broadens-sanctions-against-iran-s-primary-proxy-hezbollah> [<https://perma.unl.edu/VX7L-SCBX>].

40. Kate Nahapetian, *Confronting State Complicity in International Law*, 7 UCLA J. INT’L L. & FOREIGN AFF. 99, 101 (2002).

41. *Id.* at 112.

42. Finucane, *supra* note 10, at 408 (“Although many external actors provide various forms of assistance to groups inside Syria, few non-State actors could be considered to be under the ‘effective control’ of their benefactors.”).

law. As a general rule, international law can be created through treaties, customary international law, general principles of international law, or judicial decisions and the writings of “the most highly qualified publicists.”<sup>43</sup> Binding customary international law is evidenced by “a general and consistent practice of [S]tates followed by them from a sense of legal obligation,” sometimes referred to as *opinio juris* for its Latin name.<sup>44</sup> As the U.S. Supreme Court explained in *Paquete Habana*, customary international law is established by “the common consent of civilized communities,” which is enforceable because “it has been generally accepted as a rule of conduct.”<sup>45</sup>

While customary international law and treaties are distinct sources of international law, they are “complexly interrelated.”<sup>46</sup> Treaties can either codify existing customary international law or create new binding rules of customary law.<sup>47</sup> At times, a network of treaties, particularly multilateral treaties coupled with general State practice that is consistent with these treaties, can form the basis of binding customary international law that applies to States even if they are not party to those treaties.<sup>48</sup>

Evidence for D2R can be found in multiple sources of international law. Based on its analysis of State practice, the ILC has determined that there is a general prohibition against States assisting other States in “internationally wrongful acts.”<sup>49</sup> The International Court of Justice (ICJ) has concluded that this rule on State complicity is part of binding customary international law.<sup>50</sup> A close look at State practice also evinces a more specific prohibition against State complicity in acts that violate *jus cogens* norms.

A series of treaties, such as the Genocide Convention and the Arms Trade Treaty, have further codified this more specific D2R principle. Various interpretative bodies have read treaties that address *jus cogens* violations together with the general customary rule on State complicity articulated by the ILC in Article 16. For example, the ICJ

43. See Statute of the International Court of Justice, art. 38(1), June 26, 1945, 59 Stat. 1031, 33 U.N.T.S. 993.

44. RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES, § 102 (1987).

45. *The Paquete Habana*, 175 U.S. 677, 711 (1900).

46. PHILIP ALSTON & RYAN GOODMAN, INTERNATIONAL HUMAN RIGHTS 74 (2013). For example, even though the United States is not a signatory to the United Nations Convention on the Law of the Sea (UNCLOS), U.S. courts have held that it is binding on the United States because it amounts to customary international law. *United States v. Jho*, 534 F.3d 398, 406 (5th Cir. 2008); see also *United States v. Royal Caribbean Cruises, Ltd.*, 11 F. Supp. 2d 1358, 1372 (S.D. Fla. 1998) (finding that UNCLOS is properly considered customary international law).

47. *Id.*

48. *Id.* at 75.

49. Draft Articles, *supra* note 8, cmt. 1, at 31.

50. *Bosnian Genocide Case*, *supra* note 37, at ¶ 420.

has held that the Genocide Convention codified the customary rule on State complicity articulated by the ILC, with respect to the crime of genocide.<sup>51</sup> The U.K. Parliament's Joint Committee on Human Rights, in a report on alleged U.K. complicity in torture, drew from Article 16 and the Convention against Torture when defining State complicity in torture.<sup>52</sup> In *El Masri v. Macedonia*, *Al Nashiri v. Poland*, and *Husayn v. Poland*, the European Court of Human Rights referenced the general rule on State complicity, codified in Article 16, as relevant international law when it found that the respondent States violated the prohibition on torture in the European Convention on Human Rights by transferring the petitioners to the custody of the United States, despite the existence of a real risk that they would be tortured.<sup>53</sup>

### A. The ILC's Draft Articles on State Responsibility

The general rule on State complicity is a rather recent development in international law. In the 2001 ARSIWA, the ILC—the primary interpretive body of international law norms—outlined a set of general rules that identified “which acts are [S]tate acts, what consequences arise from the breach of an international obligation, and when the wrongfulness of an act may be precluded.”<sup>54</sup> The ARSIWA is not equivalent to treaty law, but it gives States a sense of the rules that may amount to customary international law, which is binding on States.<sup>55</sup> In a way, the ARSIWA is akin to the Model Penal Code, which documents general practice and is an inspiration for criminal codes enacted by States across the United States, even though it, in itself, is not binding law.

Over the past century, the ILC has done a rather dramatic about-face on State Accomplice liability, moving from complete rejection to enthusiastic endorsement. Initially, in his Hague Lectures of 1939,

51. *Id.*

52. Jackson, *supra* note 1, at 152 (quoting Joint Committee on Human Rights, Allegations of U.K. Complicity in Torture, 2008–09, H.L. 152, H.C. 230 (U.K.)).

53. *El Masri v. the Former Yugoslav Republic of Macedonia*, App. No. 39630/09, Eur. Ct. H.R. (Dec. 13, 2012); *Al Nashiri v. Poland*, App. No. 28761/11, Eur. Ct. H.R. (July 24, 2014); *Husayn (Abu Zubaydah) v. Poland*, App. No. 7511/13, Eur. Ct. H.R. (July 24, 2014).

54. See JACKSON, *supra* note 1, at 147 (“Chapter IV ARISWA, which concerns the responsibility of [S]tates in connection with the actions of another [S]tate, includes Article 16. Article 16 sets out a rule that prohibits [S]tates from aiding or assisting another [S]tate in the commission of an internationally wrongful act.” (citation omitted)). The ILC plays a role in both articulating what constitutes international customary law and influencing its development. Nahapetian, *supra* note 40, at 101; Shana Tabak, *Ambivalent Enforcement: International Humanitarian Law at Human Rights Tribunals*, 37 MICH. J. INT’L L. 661, 674 (2016) (describing the ILC as the “the primary interpretive body of international law norms”).

55. Nahapetian, *supra* note 40, at 101.

ILC founder Roberto Ago rejected the notion of State complicity, arguing that:

[I]t appears inconceivable in international law to have any form of complicity, participation, or incitement to a delict. The law of nations, in its current structure, does not allow for such forms of a consideration shared by several subjects with respect to a single delict; these constructs are characteristic of the nature and development of domestic criminal law.<sup>56</sup>

However, persuaded by the growing condemnation of State accomplices, the ILC later embraced a customary rule on State complicity. In 1970, in a dramatic departure from his original stance, Roberto Ago laid out the conceptual framework in his second report to the ILC. There he conceived of State complicity as a secondary rule that only came into play once a primary rule had been breached.<sup>57</sup> In other words, assisting States could only be complicit if the underlying act of the principal State was illegal.<sup>58</sup> By 1978, in its report to the U.N. General Assembly, the ILC asserted that “the idea of participation in the internationally wrongful act of another by providing ‘aid or assistance’—and thus, in this sense, of ‘complicity’—has now gained acceptance in international law.”<sup>59</sup> Later, in its 1996 report to the U.N. General Assembly, the ILC stated that the duty to refrain from assisting other States in the commission of wrongful acts was “an already well-established practice.”<sup>60</sup> Scholar Miles Jackson described this as “a radical leap in the morality of international law.”<sup>61</sup>

Thus, after 50 years of deliberation on the subject, when the ILC released ARSIWA in 2001, it included Article 16, a provision meant to address State complicity in the wrongdoing of other States.<sup>62</sup> Article 16 specified the following:

A State which aids and assists another State in the commission of an internationally wrongful act by the latter is internationally responsible for doing so if:

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56. JACKSON, *supra* note 1 (quoting Roberto Ago, 68 *Le Délit International*, (II) RECUEIL DES COURS 419, 523 (1939) (translated)).
  57. *Id.* at 148.
  58. *Id.* at 139 (“Responsibility arises for the complicit [S]tate only where the principal [S]tate actually perpetrates an act of aggression against a third [S]tate—without the principal’s wrongful act, there is nothing for the complicit [S]tate to be complicit in.”).
  59. Int’l Law Comm’n, Rep. on the Work of its Thirtieth Session, Supp. No. 10, U.N. Doc. A/33/10 (1979), reprinted in [1978] Y.B. Int’l L. Comm’n 74, 103, at para. 15, U.N. Doc. A/CN.4/SER.A/1978/Add.1, Part 2 [hereinafter Thirty-Third Session ILC Report].
  60. Int’l Law Comm’n Rep. on the Work of its Forty-Eighth Session, Supp. No. 10, at 39, para. 3, U.N. Doc. A/51/10 (1996) [hereinafter Forty-Eighth Session ILC Report].
  61. JACKSON, *supra* note 1, at 135.
  62. Draft Articles, *supra* note 8, art. 16, at 65; JACKSON, *supra* note 1, at 147 (citation omitted). The Draft Articles “are considered by courts and commentators to be in whole or in large part an accurate codification of the customary international law of [S]tate responsibility.” JAMES CRAWFORD, *STATE RESPONSIBILITY: THE GENERAL PART* 43 (2013).

- a) that State does so with knowledge of the circumstances of the international wrongful act; and
- b) that act would be internationally wrongful if committed by that State.<sup>63</sup>

The Commentary to Article 16 in the Draft Articles sets out three elements that must be shown to establish State complicity:

First, the relevant State organ or agency providing aid or assistance must be aware of the circumstances making the conduct of the assisted State internationally wrongful; secondly, the aid or assistance must be given with a view to facilitating the commission of that act, and must actually do so; and thirdly, the completed act must be such that it would have been wrongful had it been committed by the assisting State itself.<sup>64</sup>

As reflected in the Commentary, State complicity is by its nature derivative.<sup>65</sup> In other words, assisting another State in its activities is not illegal unless the conduct of the principal State actor is wrongful. Still, an assisting State is not responsible for the wrongdoing of the principal State actor; rather it is responsible for the separate crime of State complicity.<sup>66</sup> Simply put, the wrongful acts of the principal State actor are not imputed to complicit States as they would be under the doctrine of attribution.<sup>67</sup> Instead, an assisting State is *only liable for the harm that resulted from its own acts*.

In this way, State complicity is distinct from individual criminal liability in many common law jurisdictions, where the acts of the principal actor are imputed to the accomplice. For example, in the United States, 18 U.S.C. § 2 makes an accomplice punishable as a principal. In the American Law Institute's Model Penal Code, Section 2.06 provides that an accomplice "is legally accountable for the conduct of another person . . . ."<sup>68</sup> In England and Wales, the Accessories and Abettors Act provides that accomplices can be indicted, tried, and punished as if they are the main perpetrators of the crime.<sup>69</sup>

In contrast to the criminal law in these national jurisdictions, the ILC, in the Commentary to the Draft Articles, specified that "the assisting State [will] only be responsible to the extent that its own conduct has caused or contributed to the internationally wrongful act."<sup>70</sup> This conduct does not need to be "essential" to the commission of the wrongful act; rather, a State will be responsible if it "contributed significantly to that act."<sup>71</sup> Yet, to be culpable, Article 16 requires that the assisting State must have knowledge "of the circumstances of the

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63. Draft Articles, *supra* note 8, art. 16, at 65.

64. *Id.* art. 16, cmt. 3, at 66.

65. JACKSON, *supra* note 1, at 5.

66. *Id.* at 3-4.

67. *Id.* at 7.

68. For a more in-depth description of differentiation between the principal and accomplice in criminal law, see *id.* at 23-24.

69. *Id.* at 23.

70. Draft Articles, *supra* note 8, art. 16 cmt. 1, at 66.

71. *Id.* art. 16, cmt. 5, at 66.

internationally wrongful act.”<sup>72</sup> The Commentary to Article 16 gives the example of “knowingly providing an essential facility or financing the activity in question.”<sup>73</sup>

This general duty has gained prominence in international law. Citing consistent State practice, the ILC has concluded that State responsibility for complicity in the wrongful acts of other States is part of customary international law.<sup>74</sup> In the *Bosnian Genocide Case* of 2007, the International Court of Justice (ICJ) affirmed that Article 16 rises to the level of customary international law, which is binding.<sup>75</sup> Similarly, in a case involving alleged German complicity in the United States’ luring of a Yemeni man to Germany for the purposes of extradition, the Federal Constitutional Court of Germany also applied Article 16 because it concluded that it codified customary international law.<sup>76</sup> Furthermore, although the U.N. General Assembly has not formally adopted the ILC’s Draft Articles, it has consistently commended them year after year.<sup>77</sup>

The existence of a general rule on State complicity in internationally wrongful acts does not preclude the more specific principle that D2R represents. As Miles Jackson notes in his seminal book on State complicity, the general rule naturally will come to be supplemented by other more specific rules on State complicity, particularly those that address issues of grave concern like breaches of peremptory, non-derogable norms of international law.<sup>78</sup> In addition, a more specific rule on State complicity does not need to be the mirror image of the general rule. Pursuant to *lex specialis derogat legi generali*, a legal doctrine that provides that if two laws govern the same factual situation, a law specifically tailored to the subject matter in question (*lex specialis*) overrides a general law (*lex generalis*).<sup>79</sup> Typically, a more specific

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72. *Id.* art. 16, cmt. 4.

73. *Id.* art. 16, cmt. 1.

74. Thirty-Third Session ILC Report, *supra* note 59, art. 27, cmt. 15, at 103.

75. *Bosnian Genocide Case*, *supra* note 37, ¶ 420, at 178. For a discussion of the *Bosnian Genocide case*, see Nolte & Aust, *supra* note 10, at 7.

76. The court held that because the underlying act of luring the man to Germany was not wrongful, Germany was not complicit in the commission of a crime. JACKSON, *supra* note 1, at 151.

77. MOYNIHAN, *supra* note 10, at 6 (“The UN General Assembly’s Sixth Committee has established a Working Group on the Responsibility of States for Internationally Wrongful Acts to consider further the question of whether the Articles on State Responsibility should be turned into a Convention.” (citing G.A. Res. 68/104, On the Responsibility of States for Internationally Wrongful Acts (Dec. 16, 2013))).

78. JACKSON, *supra* note 1, at 172–73 (“New rules might arise, imposing stricter standards on [S]tates in respect of matters of particularly grave concern.”).

79. Int’l Law Comm’n, *Fragmentation of International Law: Difficulties Arising from the Diversification and Expansion of International Law*, ¶ 5, U.N. Doc. A/CN.4/L.682 (Apr. 13, 2006) (“The maxim *lex specialis derogat legi generali* is a generally accepted technique of interpretation and conflict resolution in international

rule on D2R would trump the general rule on State complicity. Thus, the general rule could be used as a guide or reference point for emerging rules, which could impose stricter standards, particularly when it involves grave breaches of international law.<sup>80</sup>

For example, when the “internationally wrongful act” in question amounts to a violation of a *jus cogens* norm, a stricter *mens rea* could be warranted. The ILC has eluded to as much when in its Commentary to Article 16, it specified:

Where the allegation is that the assistance of a State has facilitated human rights abuses by another State, the particular circumstances of each case must be carefully examined to determine whether the aiding State by its aid was *aware of and intended to* facilitate the commission of the internationally wrongful conduct.”<sup>81</sup>

This mention of intent is notable since a similar *mens rea* requirement, while present in the first Draft Articles, was eliminated in its existing formulation.<sup>82</sup> As noted above, the current general rule on State complicity only requires knowledge “of the circumstances of the internationally wrongful act.”<sup>83</sup> So, arguably, this reference to intent in the context of human rights violations implies that when a State intends to facilitate violations of human rights, then it is more culpable than a State who does so incidentally.

## B. What Does State Practice Tell Us?

As explained above, in order for a rule of customary international law to exist, there must be evidence of general, constant, and uniform State practice and a widespread belief among States (*opinio juris*) that the rule amounts to customary international law.<sup>84</sup> Much of the evidence used to support a finding of a general prohibition on State complicity in international wrongdoing also supports the finding of a more specific rule concerning D2R. As a number of scholars, including Aust, have observed, the State practice cited by the ILC to establish a rule on State responsibility for complicity mostly addresses violations of *jus cogens* norms.<sup>85</sup> Miles Jackson too pointed out that much of the evidence of State practice used to support the prohibition against State complicity in internationally wrongful acts involves a fairly limited number of international wrongs, specifically the crime of aggres-

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law. It suggests that whenever two or more norms deal with the same subject matter, priority should be given to the norm that is more specific.”)

80. JACKSON, *supra* note 1, at 172.

81. Draft Articles, *supra* note 8, art. 16, cmt. 9, at 67.

82. Nahapetian, *supra* note 40, at 106–07.

83. Draft Articles, *supra* note 8, art. 16, at 65.

84. JAMES CRAWFORD, BROWNIE'S PRINCIPLES OF INTERNATIONAL LAW (2012).

85. AUST, *supra* note 3, at 190.



sion, human rights violations, and the evasion of Security Council sanctions.<sup>86</sup>

A close examination of State practice evinced by the ILC to establish a binding rule on State complicity supports the claims of these scholars. The most recent iteration of the ARISWA relies entirely on case studies that involve violations of *jus cogens* norms. Specifically, in support of its finding that persistent State practice pointed to a prohibition on State complicity in international crimes, the ILC relied on cases involving crimes that violate *jus cogens* norms, namely, the crime of aggression and crimes against humanity. First, the ILC highlighted a complaint that Iran lodged against the United Kingdom in 1984 for supplying Iraq with chemical weapons, which Iraq allegedly used against Iranian troops.<sup>87</sup> Iran characterized the United Kingdom's provision of these weapons as an act of aggression.<sup>88</sup> Although the United Kingdom denied the charge, the United States issued a public rebuke of Iraq.<sup>89</sup> After a U.N. inspection team concluded that Iraq had used chemical weapons against Iran, the United States and several European States halted the sale of the substances used to make these chemical weapons to Iraq.<sup>90</sup> Second, the ILC cited a similar situation in 1998 involving Sudan, which was accused of allowing Iraqis to use Sudanese installations to produce nerve gas.<sup>91</sup> That year, the U.S. government bombed a Sudanese installation based on its belief that Iraq was using the factory to produce the nerve agent VX.<sup>92</sup> The ILC also relied on U.N. General Assembly resolutions asking U.N. Member States to refrain from supplying arms and other assistance to countries with questionable human rights records.<sup>93</sup>

Furthermore, when the ILC stated that the general rule in Article 16 prohibited States from permitting other States to use their territory to violate the international rules on the use of force, all of the examples that the ILC used to justify this proposition involved the crime of aggression.<sup>94</sup> For instance, the ILC relied on a statement from West Germany explaining its rationale for allowing the United

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86. JACKSON, *supra* note 1, at 15.

87. Draft Articles, *supra* note 8, art. 16, cmt. 7, at 66.

88. *Id.*

89. *Id.*; Bernard Gwertzman, *U.S. Says Iraqis Used Poison Gas Against Iranians in Latest Battles*, N.Y. TIMES (March 6, 1984), <http://www.nytimes.com/1984/03/06/world/us-says-iraqis-used-poison-gas-against-iranians-in-latest-battles.html>.

90. Quigley, *supra* note 38, at 91 (citation omitted).

91. *Id.* (citing Jane Perlez, *After the Attacks: The Connection; Iraqi Deal with Sudan on Nerve Gas Is Reported*, N.Y. TIMES (Aug. 26, 1998), <http://www.nytimes.com/1998/08/26/world/after-the-attacks-the-connection-iraqi-deal-with-sudan-on-nerve-gas-is-reported.html>).

92. Perlez, *supra* note 91.

93. Draft Articles, *supra* note 8, art. 16, cmt. 9, at 67.

94. *Id.* art. 16 cmt. 8, at 66–67.

States to use its airfields to attack Lebanon.<sup>95</sup> While the Soviet Union claimed that this assent amounted to an act of aggression, West Germany defended its actions by claiming that the United States was acting in self-defense, which is permitted under the international rules on the use of force.<sup>96</sup> According to the ILC, this defense implied that West Germany believed that if it had assisted the United States in the commission of an act of aggression, it would have constituted a separate violation in itself.<sup>97</sup>

A number of other international institutions have also referenced D2R principles. The U.N. General Assembly has invoked the duty to refrain from assisting other countries in committing human rights violations in several resolutions.<sup>98</sup> For instance, the General Assembly urged governments “to refrain from supplying arms and other military assistance as long as serious human rights violations in Guatemala continue to be reported.”<sup>99</sup> Similarly, the Assembly called on States “to refrain from the supply of arms and other military assistance” to El Salvador because of reports of serious human rights violations occurring there.<sup>100</sup>

After 9/11, a number of European institutions also issued opinions that reflected D2R principles when addressing the coordination among States to facilitate the detention of individuals in secret sites and the extraordinary rendition of these detainees to countries where they would likely be subjected to torture.<sup>101</sup> When reports emerged that some European States assisted the United States in these efforts—by granting overflight rights, the provision of secret detention centers, and exchanging intelligence—the Parliamentary Assembly of the Council of Europe and the European Parliament of the European Union issued statements regarding those practices.<sup>102</sup>

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95. *Id.*

96. Nahapetian, *supra* note 40, at 103.

97. *Id.*

98. Marko Divac Öberg, *The Legal Effects of Resolutions of the UN Security Council and General Assembly in the Jurisprudence of the ICJ*, 16 *Eur. J. Int'l. L.* 879, (2006) (citing *Military and Paramilitary Activities in and Against Nicaragua (Nicar. v. U.S.)*, Judgment, 1986 I.C.J. Rep 14, at 103, para. 195 (June 27) [hereinafter *Nicaragua Case*] (stating that a G.A. resolution “may be taken to reflect customary international law”)).

99. GA Res. A/37/745 XVII, at 17 (Dec. 14, 1982).

100. Situation of Human Rights and Fundamental Freedoms in El Salvador, 15 December 1980, Draft Res. IX. The vote was 70–12–55.

101. Extraordinary rendition is “a process by which a detainee is transferred into another State’s custody outside regular legal proceedings and with the prospect of being subjected to torture or at least cruel, inhuman or degrading treatment.” AUST, *supra* note 3, at 120 (citing Council of Europe, Venice Commission, Opinion on the International Legal Obligations of Council of Europe Member States in Respect of Secret Detention Facilities and Inter-State Transport of Prisoners, Opinion No. 363/2005 (March 17, 2006) [hereinafter *Venice Commission*]).

102. AUST, *supra* note 3, at 120.

The Parliamentary Assembly of the Council of Europe issued a resolution urging States to ensure that “all international co-operation and mutual legal assistance is carried out only in circumstances that respect human rights and international conventions in the field.”<sup>103</sup> In its opinion regarding the legal obligations of State parties of the Council of Europe concerning the U.S. Rendition Program, the European Commission for Democracy through Law concluded that, pursuant to ILC Draft Article 16, providing “transit facilities to another State may amount to providing assistance to the latter in committing a wrongful act, if the former State is aware of the wrongful character of the act concerned.”<sup>104</sup> In his report, the Secretary General of the Council of Europe added that:

In accordance with the generally recognised rules on State responsibility, States may be held responsible for aiding or assisting another State in the commission of an internationally wrongful act. There can be little doubt that aid or assistance by agents of a State party in the commission of human rights abuses by agents of another State acting within the former’s jurisdiction would constitute a violation of the [European] Convention [on Human Rights].<sup>105</sup>

Similarly, drawing from both Article 16 and the Convention against Torture, in a report evaluating the United Kingdom’s alleged complicity in torture, the U.K. Parliament’s Joint Committee on Human Rights defined State complicity in torture as follows:

[F]or the purposes of State responsibility for complicity in torture . . . complicity means simply one State giving assistance to another State in the commission of torture, or acquiescing in such torture, in the knowledge, including constructive knowledge, of the circumstances of the torture which is or has been taking place.<sup>106</sup>

Also, in a 2009 report, the Special Rapporteur on human rights and terrorism underscored the relevance of Article 16 when States consider whether to cooperate in rendition, detention, or interrogation.<sup>107</sup>

The practices of individual States also support the existence of D2R. For instance, in 1974, the U.S. Congress passed a law that prohibited the U.S. government from giving military aid to “any country the government of which engages in a consistent pattern of gross vio-

103. *Id.* at 121 (quoting Eur. Parl. Ass. Res. 1507, Alleged Secret Detentions and Unlawful Inter-State Transfers of Detainees Involving Council of Europe Member States (June 27, 2006), at ¶ 19.4.).

104. Venice Commission, *supra* note 101, ¶ 45, at 11.

105. Council of Europe, ‘Report of the Secretary General on the Use of His Powers under Article 52 of the European Convention on Human Rights,’ SG/Inf (2006), at 5, para. 23.

106. Jackson, *supra* note 1, at 152 (quoting Joint Committee on Human Rights, Allegations of UK Complicity in Torture, 2008–09, H.L. 152, H.C. 230 (U.K.)).

107. *Id.* (quoting Special Rapporteur on the Promotion and Protection of Human Rights, *Report of the Special Rapporteur on the Promotion and Protection of Human Rights and Fundamental Freedoms While Countering Terrorism*, U.N. Doc. A/HRC/10/3 (Feb. 4, 2009)).

lations of internationally recognized human rights” except under extraordinary circumstances.<sup>108</sup> In line with this legislation, the United States has stopped the sale of arms to Israel, a close ally of the United States, when it suspected that Israel was involved in gross violations of human rights. Specifically, after learning that Israel used U.S.-supplied cluster bombs in Lebanon, which resulted in injury to civilians, the United States stopped all shipment of the bombs to Israel while it investigated Israel’s use of them.<sup>109</sup> That same legislation also requires the United States to terminate economic (non-military) aid to States that violate human rights.<sup>110</sup>

Other States have taken a similar approach of suspending foreign aid as a means to pressure other countries to stop violating human rights. For example, a number of States terminated foreign aid to Chile in 1973, citing human rights violations. As a U.N. commission reported:

[T]he vast majority of the States which have commented on their behaviour vis-à-vis Chile in the field of economic relations after 11 September 1973, have pointed out that they have either refused or substantially decreased their economic assistance to Chile, as a direct consequence of the suppression of civil and political rights in that country carried out by the present authorities. Thus, the introduction of a repressive system in Chile has resulted in a vast segment of the international community denying economic aid to Chile, with a view to bringing pressure to bear on the present Chilean authorities for a restoration of human rights in that country.<sup>111</sup>

In other cases, governments have established investigatory bodies to determine whether other States were complicit in *jus cogens* violations.<sup>112</sup> For example, the Rwandan government suspected the involvement of French military advisors who were present in Rwanda in the genocide in 1994 and so established an investigatory commission in order to investigate whether France was complicit in the genocide.<sup>113</sup>

Some State actors have acknowledged and expressed remorse for their complicity in the grave crimes of other States. For example, U.S. President Bill Clinton apologized for the U.S. government’s complicity

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108. 22 U.S.C. § 2304(a), cmt. 2 (2012).

109. Quigley, *supra* note 38, at 91.

110. 22 U.S.C. § 2304(c), cmt. 4(A) (2012).

111. Study of the Impact of Foreign Economic Aid and Assistance on Respect for Human Rights in Chile, 31 Sub-Comm’n on Prevention of Discrimination and Protection of Minorities, para. 419, UN Doc. E/CN.4/Sub.z/412 (1978). On the 1973 Chile aid cut-offs, see generally Antonio Cassese, *Foreign Economic Assistance and Respect for Civil and Political Rights: Chile-A Case Study*, 50 TEX. INT’L L.J. 647, 648–52 (2016).

112. Nolte & Aust, *supra* note 10, at 9–10.

113. *Id.* at 9 (quoting Philippe Bernard, *Le Rwanda publie son requisitoire contre la France*, LE MONDE (Aug. 6, 2008)).

in gross human rights violations in Guatemala, Rwanda, and Greece.<sup>114</sup>

Finally, in recent times, a number of States have openly articulated D2R principles with regard to Russia's support of the Assad regime. Specifically, the United States, United Kingdom, and France have all condemned Russia's complicity in the war crimes perpetrated by Assad in Syria.<sup>115</sup>

### C. More Specific Rule for Accessories After the Fact

Further evidence of D2R is the ILC's finding of a special rule for accessories after the fact, which applies once a serious breach of a *jus cogens* norm occurs. This rule, stipulated in Article 41(2), provides that "[n]o [S]tate shall recognize as lawful a situation created by a serious breach within the meaning of Article 40, nor render aid or assistance in maintaining that situation."<sup>116</sup> Article 40 limits the application of Article 41(2) to "serious breaches of obligations under peremptory norms of general international law."<sup>117</sup> A serious breach of a peremptory norm is defined as a breach involving "a gross or systematic failure by the responsible State to fulfill its obligations."<sup>118</sup> Unlike Article 16, these Articles do not require that the responsible State know about the serious breach in order to be held responsible.<sup>119</sup> In this sense, Article 41 provides strict liability for complicity in *jus cogens* violations.

The legal consequences that flow from a breach of Article 41 are also distinct from a breach of Article 16. In its Commentary to Article 41, the ILC specified that States have "a duty of abstention" comprised of two obligations: (1) the obligation of non-recognition of a situation resulting from "serious breaches of obligations under peremptory norms of general international law," and (2) the obligation "not to

114. AUST, *supra* note 3, at 104.

115. *Syria Conflict: France Wants Russia on War Crimes Charges*, BBC (Oct. 10, 2016), <http://www.bbc.com/news/world-europe-37611151>; J.J. Gallagher & Veronica Stracqualursi, *Tillerson Draws Line in the Sand over Russia's Support of Assad Regime*, ABC NEWS (Apr. 11, 2017), <http://abcnews.go.com/International/tillerson-assads-reign-syria-coming-end/story?id=46723724>; UK Minister Condemns Russia for "Giving Green Flag" to Assad, EU TODAY (Apr. 28, 2018), <https://eutoday.net/news/human-rights/2018/uk-minister-condemns-russia-for-giving-green-flag-to-assad>.

116. Draft Articles, *supra* note 8, art. 41(2), at 114.

117. Draft Articles, *supra* note 8, art. 40, at 113; *see also* JACKSON, *supra* note 1, at 173 ("The second clause of Article 41(2) supplements the prohibition on aid and assistance in Article 16, dealing 'with conduct "after the fact" which assists the responsible [S]tate in maintaining' the situation created by the breach." (citation omitted)).

118. Draft Articles, *supra* note 8, art. 40, at 113.

119. MOYNIHAN, *supra* note 10, at 23 (citing AUST, *supra* note 3, at 422).

render aid or assistance in maintaining that situation.”<sup>120</sup> Additionally, all States are under a positive obligation to cooperate in bringing to an end the serious breach.<sup>121</sup> The divergence in legal consequences is likely a reflection of the narrower application of Article 41 to only the most egregious violations of international law. Also, because a breach of Article 41 is not speculative (it has already occurred), States have a higher burden to ensure that its support is not being used to aggravate or maintain an illegal situation.

D2R goes further than Article 41 in that it also applies to situations where serious breaches have yet to occur. Still, Article 41 is evidence that a narrower rule on State complicity in grave crimes is justified under international law. Article 41 can also inform how we shape the contours of D2R, particularly with regards to devising the appropriate *mens rea* requirement.

#### D. D2R in Multilateral Treaties

There are also numerous international treaties that explicitly and implicitly prohibit State complicity in grave international crimes. International treaties which obligate State parties to uphold or protect human rights include an implicit obligation not to engage in acts that facilitate the commission of human rights violations, particularly those that concern fundamental rights like the right to life. The law of treaties—codified in the Vienna Convention on the Law of Treaties—provides as much, by obligating State parties to a treaty “to refrain from acts which would defeat the object and purpose of a treaty.”<sup>122</sup> So, for example, treaties such as the International Covenant on Civil and Political Rights (ICCPR), whose object and purpose is to realize “the inherent dignity and . . . equal and inalienable rights of all members of the human family,” require State parties not to engage in acts that undermine the human rights of all people. In short, the negative obligation to refrain from acts that facilitate human rights violations flow from the positive obligation to protect them.

Other treaties expressly prohibit assistance to other States who engage in acts that will violate human rights and humanitarian law. For example, pursuant to Article 1(c) of the Convention on the Prohibition, Use, Stockpiling, Production and Transfer of Anti-Personnel Mines and on their Destruction, State parties may not “assist, encourage or induce, in any way, anyone to engage in any activity prohibited to a State party under this Convention.”<sup>123</sup> Such activities

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120. Draft Articles, *supra* note 8, art. 41, cmts. 4–6, at 114.

121. *Id.* art. 41(1), at 113.

122. Vienna Convention, *supra* note 19, art. 18.

123. Convention on the Prohibition of the Use, Stockpiling, Production and Transfer of Anti-Personnel Mines and on Their Destruction art. 1(c), Sept. 18, 1997, 2056 U.N.T.S. 211, 242.

include the use or stockpiling of anti-personnel mines, which violate humanitarian law because they do not distinguish between civilians and combatants.<sup>124</sup> In short, State parties cannot help other States, even those not bound by the treaty, to use or retain anti-personnel mines.

The Arms Trade Treaty (ATT) also prohibits the transfer of arms where a State knows that they will be used by the receiving State to commit genocide, crimes against humanity, grave breaches of the Geneva Conventions, or war crimes.<sup>125</sup> Additionally, Article 7 of the ATT requires a State party to assess whether the arms that it plans to export could be used to commit or facilitate serious violations of human rights or international humanitarian law and if so, to “consider whether there are measures that could be undertaken to mitigate risks.”<sup>126</sup> If there is an “overriding risk” that the arms might be used to commit a serious violation of international humanitarian law, then a State should not export arms to them.<sup>127</sup>

Like the ATT, the Geneva Conventions prohibit State complicity in grave violations of humanitarian law. Article 1, the so-called “nucleus for a system of collective responsibility” and common to all the Geneva Conventions, requires State parties to “respect and to ensure respect” for the Convention “in all circumstances.”<sup>128</sup> In addition to the positive obligation to prevent other States from violating international humanitarian law codified in the Geneva Conventions, Article 1 implies a negative obligation on State parties not to encourage, nor aid or assist, in these violations.<sup>129</sup> As a recent commentary from the International Committee of the Red Cross (ICRC) explained:

The duty to ensure respect for the Geneva Conventions is particularly strong in the case of a partner in a joint operation . . . . The fact, for example, that a High Contracting Party participates in the financing, equipping, arming or training of the armed forces of a Party to a conflict, or even plans, carries out and debriefs operations jointly with such forces, places it in a unique position

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124. *Id.* at Preamble, art. 1(a)–(b).

125. MOYNIHAN, *supra* note 10, at 28 (citing Arms Trade Treaty art. 6(3), Apr. 2, 2013, U.N. Doc. A/Conf.217/2013/L.3 [hereinafter ATT] (stating that a State should not export arms to another country “if it has knowledge at the time of authorization that the arms or items would be used in the commission of genocide, crimes against humanity, grave breaches of the Geneva Conventions of 1949, attacks directed against civilian objects or civilians protected as such, or other war crimes as defined by international agreements to which it is a Party.”)).

126. ATT, *supra* note 125, art. 7.

127. *Id.*

128. Geneva Convention Relative to the Treatment of Prisoners of War art. 1, Aug. 12, 1949, 6 U.S.T. 3316, 75 U.N.T.S. 135; AUST, *supra* note 3, at 385.

129. MOYNIHAN, *supra* note 10, at 26 (citing International Committee of the Red Cross (ICRC), *Commentary on the First Geneva Convention*, art. 1, ¶ 154 (2d ed. Mar. 22, 2016), <https://ihl-databases.icrc.org/ihl/full/GCI-commentary> [<https://perma.unl.edu/C9KC-ZPQL>] [hereinafter Commentary to the First Geneva Convention]).

to influence the behaviour of those forces, and thus to ensure respect for the Conventions.<sup>130</sup>

While it is debatable whether this imposes a duty or even a right to take countermeasures against States that violate the Geneva Conventions, at the very least, it mandates States not to render aid to those that do.<sup>131</sup> Arguably, Article 1 also requires State parties to be more vigilant that their assistance is not likely to be used in future violations of the Geneva Conventions.<sup>132</sup>

A number of actors have come to that conclusion. In a response to parliamentary questions about the possibility that Dutch intelligence had been used to facilitate U.S. drone strikes, the Dutch government affirmed that, pursuant to Article 1, “when the Government knows that a partner is using or will use intelligence that has been shared by the Netherlands to commit a violation of international law and/or IHL, the question whether such intelligence is shared will have to be reconsidered.”<sup>133</sup> Similarly, after concluding that Israel violated the Geneva Conventions by annexing and colonizing territory in Palestine and other Arab territories, the U.N. Human Rights Commission asked “all States, in particular the State parties to the Geneva Convention relative to the Protection of Civilian Persons in Time of War, in accordance with [A]rticle 1 of that Convention . . .” to refrain from “extending any aid which might be used by Israel in its pursuit of the policies of annexation and colonization . . . .”<sup>134</sup>

According to Theodor Meron, who served as a judge for the International Criminal Tribunal for the Former Yugoslavia and is now the President of the International Residual Mechanism for Criminal Tribunals:

The *erga omnes* character of many of the norms in these Conventions implies that third [S]tates have not only the right to make appropriate representations urging respect for these norms to [S]tates allegedly involved in violating them, but also a duty not to encourage others to violate the norms, and, perhaps, even to discourage others from violating them.<sup>135</sup>

The Genocide Convention has also been at the forefront of the rules on State complicity in grave crimes. The Genocide Convention is one of

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130. Commentary to the First Geneva Convention, *supra* note 129, at ¶ 153.

131. AUST, *supra* note 3, at 388.

132. *Id.* at 389.

133. See Tweede Kamer der Staten-Generaal [Lower House of Parliament], *Aanhangsel van de Handelingen* [Appendix to the Acts], *Vragen Gesteld door de Leden der Kamer, met de Daarop door de Regering Gegeven Antwoorden* [Questions Asked by the Members of the House, with the Answers Given by the Government], No. 1177, Vergaderjaar [Meeting Year] 2015–16.

134. Comm’n on Human Rights, Rep. on the Fortieth Session, U.N. Doc. E/1984/14, E/CN.4/1984/77, at 21 (1984).

135. Theodor Meron, *The Geneva Conventions as Customary Law*, 81 AM. J. INT’L L. 348, 355 (1987) (discussing U.S. responsibility for actions in Nicaragua).



the few human rights treaties that explicitly prohibit complicity.<sup>136</sup> Article III of the Convention lists “complicity in genocide” as one of five punishable acts, but it does not define it.<sup>137</sup> Traditionally, this provision was understood to require States to punish individuals who were complicit in genocidal acts.<sup>138</sup> Yet, when Ago proposed the adoption of a draft article on State complicity in 1978, he used the case where a State provides weapons to another State to aid its commission of genocide as an example of State complicity and queried whether the reference to complicity in the Genocide Convention included State complicity.<sup>139</sup>

This expanded understanding has now gained acceptance by authorities on international law. The ICJ has played a fundamental role in advancing State responsibility for complicity in genocide pursuant to Article III of the Genocide Convention. In an advisory opinion in 1951, the ICJ concluded that the Genocide Convention did not include any new commitments regarding genocide; rather, it formally codified obligations that were already binding on States as part of customary international law.<sup>140</sup> Some fifty years later in the *Bosnian Genocide Case*, the ICJ interpreted the complicity referenced in Article III of the Genocide Convention to include both individual and State responsibility.<sup>141</sup> In that case, Bosnia and Herzegovina alleged that the Federal Republic of Yugoslavia (FRY) provided political, financial, and military resources and encouragement to its agents and surrogates including the authorities of Republika Srpska in order to facilitate the commission of genocide in Srebrenica.<sup>142</sup> The court thus addressed whether the FRY was complicit in the genocide perpetrated by Republika Srpska.<sup>143</sup>

The ICJ found that the Genocide Convention imposed an obligation on States not to be complicit in genocide.<sup>144</sup> The Court expressly linked the provision in the Genocide Convention to the ILC’s general rule on State complicity, concluding that there was:

no reason to make any distinction of substance between ‘complicity in genocide’, within the meaning of Article III, paragraph (e), of the [Genocide] Con-

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136. Nahapetian, *supra* note 40, at 122.

137. Convention on the Prevention and Punishment of the Crime of Genocide art III, Dec. 9, 1948, 78 U.N.T.S. 277; see Paulo Palchetti, *State Responsibility for Complicity in Genocide*, in *THE UN GENOCIDE CONVENTION: A COMMENTARY* 381, 381–82 (Paola Gaeta ed., 2009).

138. AUST, *supra* note 3, at 390.

139. Palchetti, *supra* note 137, at 381–82 (citing *Seventh Report on State Responsibility by Roberto Ago, Special Rapporteur*, U.N. A/CN.4/SER.A/1978/Add.1 (Part 1) (1978)).

140. AUST, *supra* note 3, at 391.

141. *Bosnian Genocide Case*, *supra* note 37, at ¶ 167.

142. JACKSON, *supra* note 1, at 202.

143. *Id.* at 203.

144. *Id.*

vention and the 'aid or assistance' of a State in the commission of a wrongful act by another State within the meaning of the aforementioned Article 16.<sup>145</sup>

#### IV. CONNECTION TO THE RESPONSIBILITY TO PROTECT (R2P)

Despite being a well-established principle of international law, the duty to refrain from aiding and abetting the grave crimes of other States has received minimal attention from legal scholars and policy-makers. It has been largely overshadowed by another related guiding principle in international law: R2P.

##### A. Defining R2P

R2P is broadly defined as the normative proposition that while States have the primary duty to protect their own citizens from human rights abuses, if they are unwilling or unable to do so, the international community has a responsibility to protect these citizens.<sup>146</sup> The international community created R2P in the aftermath of the egregious atrocities in Bosnia and Rwanda, where the international community failed to intervene even when it was clear that genocide was underway.<sup>147</sup> Following those atrocities, in a 2000 report, then U.N. Secretary-General Kofi Annan raised the question: "[I]f humanitarian intervention is, indeed, an unacceptable assault on sovereignty, how should we respond to a Rwanda, to a Srebrenica—to gross and systematic violations of human rights that offend every precept of our common humanity?"<sup>148</sup>

In response to this call, Canadian Prime Minister Jean Chrétien convened the International Commission on Intervention and State Sovereignty (ICISS), which aimed to build an "international consensus on how to respond in the face of massive violations of human rights and humanitarian law."<sup>149</sup> In its report in 2001, the ICISS defined R2P as "an idea that sovereign States have a responsibility to protect their own citizens from avoidable catastrophe—from mass

145. Bosnian Genocide Case, *supra* note 37, at ¶ 420.

146. The "Responsibility to Protect" doctrine was first outlined in 2001 in a report commissioned by the Canadian government. *See generally* Int'l Comm'n on Intervention & State Sovereignty, *The Responsibility to Protect* (Dec. 2001), <http://responsibilitytoprotect.org/ICISS%20Report.pdf> [hereinafter ICISS]. For more information about the origins of R2P, see Rachel López, *The Judicial Expansion of American Exceptionalism*, 6 DUKE F.L. & SOC. CHANGE 1 (2014).

147. William W. Burke-White, *Adoption of the Responsibility to Protect*, in *THE RESPONSIBILITY OF STOPPING MASS ATROCITIES IN OUR TIME* 18 (Jared Genser & Irwin Cotler eds., Oxford Univ. Press Oct. 2011); *see* Saira Mohamed, *Taking Stock of the Responsibility to Protect*, 48 STAN. J. INT'L L. 319, 321–22 (2012).

148. KOFI ANNAN, *WE THE PEOPLES: THE ROLE OF THE UNITED NATIONS IN THE 21ST CENTURY* 48 (2000).

149. Burke-White, *supra* note 147, at 18–19 (quoting ICISS, *supra* note 146, at 81).

murder and rape, from starvation—but that when they are unwilling or unable to do so, the responsibility must be borne by the broader community of [S]tates.”<sup>150</sup> The ICISS laid out a range of measures—including economic sanctions and criminal prosecutions—that States could take to fulfill their responsibility to protect, but primarily focused on military intervention.<sup>151</sup> However, military intervention was only permissible if it had “(1) Security Council authorization, (2) General Assembly authorization under the Uniting for Peace procedure, or (3) post hoc Security Council authorization for intervention by a regional organization.”<sup>152</sup>

Since the release of the ICISS report, R2P has gained increased recognition as a guiding principle of international law. In 2005, after a U.N. World Summit, the U.N. General Assembly unanimously adopted the World Summit Outcome Document, which affirmed that the international community “has the responsibility to use appropriate diplomatic, humanitarian and other peaceful means” to protect populations from only four specific violations: genocide, war crimes, ethnic cleansing, and crimes against humanity.<sup>153</sup> In contrast to the ICISS report, the World Summit Outcome document scaled back R2P with respect to military intervention, indicating that the international community should be “prepared to take collective action, in a timely and decisive manner, through the Security Council, in accordance with the [U.N.] Charter . . .” as opposed to having an affirmative duty to do so.<sup>154</sup> The World Summit Outcome Document also emphasized the need to help States to “build capacity to protect their populations from genocide, war crimes, ethnic cleansing and crimes against humanity and to assisting those which are under stress before crises and conflicts break out.”<sup>155</sup>

The U.N. Security Council has expressed its support for this articulation of R2P. In Resolution 1674, the Security Council reaffirmed the provisions in paragraphs 138 and 139 of the 2005 World Summit Outcome Document.<sup>156</sup> Notably, paragraph 139 of the World Summit Outcome Document specified that the international community could only take collective action “through the Security Council, in accor-

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150. ICISS, *supra* note 146, at VIII.

151. *Id.* at 8 (stating that in addition to military intervention, R2P includes “all forms of preventive measures, and coercive intervention measures—sanctions and criminal prosecutions—falling short of military intervention.”).

152. Peter Tzeng, *Humanitarian Intervention at the Margins: An Examination of Recent Incidents*, 50 VAND. J. TRANSNAT’L L. 415, 423 (2017).

153. World Summit Outcome, G.A. Res. 60/1, U.N. Doc. A/RES/60/1, at ¶ 139 (Sept. 16, 2005) [hereinafter World Summit Outcome Document].

154. *Id.*

155. World Summit Outcome Document, *supra* note 153.

156. S.C. Res. 1674, ¶ 4 (Apr. 28, 2006).

dance with the Charter, including Chapter VII . . .”<sup>157</sup> Since then, the Security Council has referenced the R2P in a number of resolutions authorizing collective action, including, notably, a resolution imposing a no-fly zone in Libya that ultimately helped topple the regime of Colonel Muammar al-Qaddafi.<sup>158</sup>

In 2009, then Secretary-General Ban Ki-moon issued a report outlining the three pillars of R2P.<sup>159</sup> Namely, the report delineated the following responsibilities: (1) States have an enduring responsibility to protect their populations from genocide, war crimes, ethnic cleansing, and crimes against humanity; (2) the international community has a responsibility to assist States in fulfilling that duty; and (3) Member States have a responsibility “to respond collectively in a timely and decisive manner when a State is manifestly failing to provide such protection.”<sup>160</sup> In later reports on R2P, he emphasized that military intervention was only possible *after* authorization by the Security Council.<sup>161</sup>

## B. R2P’s Intrinsic Connection to D2R

R2P has an intrinsic connection to D2R. First, they both address *jus cogens* norms.<sup>162</sup> As noted above, the World Summit Outcome Document limited R2P to only four crimes: genocide, war crimes, ethnic cleansing, and crimes against humanity.<sup>163</sup> These crimes, by their nature, violate *jus cogens* norms.<sup>164</sup> Second, if a State fails to uphold its negative obligation under D2R, then per se it has also failed to meet its positive obligations under R2P. As the ICISS report pointed out, R2P includes an accompanying responsibility to prevent gross human rights violations.<sup>165</sup> If a State assists another State to commit grave

157. World Summit Outcome Document, *supra* note 153.

158. For a list of Security Council resolutions that mention R2P, see UNITED NATIONS, THE RESPONSIBILITY TO PROTECT, <http://www.un.org/en/preventgenocide/rwanda/about/bgresponsibility.shtml> [https://perma.unl.edu/EX4S-VAXM]. For a critical perspective of R2P and whether it played a role in the intervention in Libya, see generally, Mohamed, *supra* note 145.

159. UN Secretary-General, *Implementing the Responsibility to Protect*, U.N. Doc. A/63/677 (Jan. 12, 2009) [hereinafter *Implementing R2P*].

160. *Id.* at 8–10.

161. Tzeng, *supra* note 152, at 424–25.

162. Eyal Benvenisti, *Sovereigns as Trustees of Humanity: On the Accountability of States to Foreign Stakeholders*, 107 AM. J. INT’L L. 295, 297 n.9 (2013) (“Various grounds have been invoked for this principle, including *jus cogens* and *erga omnes* obligations.”) (citing Jutta Brunnee & Stephen J. Toope, *The Responsibility to Protect and the Use of Force: Building Legality?*, 2 GLOBAL RESP. TO PROTECT, 191, 206–07 (2010)).

163. World Summit Outcome Document, *supra* note 153.

164. Benvenisti, *supra* note 160, at 333 (“Various grounds have been invoked for this principle, including *jus cogens* and *erga omnes* obligations.”).

165. ICISS, *supra* note 144, at ¶ 3.1.

crimes against its own people, then that assisting State clearly has not met its obligation to prevent those crimes under R2P.

The International Court of Justice (ICJ) concluded as much in the *Bosnian Genocide Case*. In that case, the ICJ found that if a State was complicit in acts of genocide, then that State also violated its treaty-based duty to prevent genocide.<sup>166</sup> The ICJ explained if a State is responsible for complicity in genocide, “then there is no point in asking whether it complied with its obligation of prevention in respect of the same acts, because logic dictates that a State cannot have satisfied an obligation to prevent genocide in which it actively participated.”<sup>167</sup>

Still, there are a few notable differences between State complicity in genocide and failure to prevent genocide. At least according to the ICJ, complicity requires some positive action, whereas a breach of the duty to prevent genocide can result from either a positive action or an omission.<sup>168</sup> Additionally, in contrast to complicity in genocide, which requires at least knowledge of the facts, a violation of the duty to prevent genocide can be found even when the assisting State did not know that its actions might facilitate genocide.<sup>169</sup> Consequently, whereas a complicit State necessarily is in violation of R2P, a State that does not meet its R2P obligations, is not necessarily complicit.

### C. Why the Focus on R2P?

In stark contrast to R2P, D2R has been largely overlooked. Even the handful of scholars that have addressed D2R focused primarily on the broader rule against State complicity, rather than the more specific prohibition against aiding and abetting other States that perpetrate grave crimes. The concentrated focus on R2P can, in part, be attributed to the reactive nature of positive law generation.

Particularly in the aftermath of tragedy, States and the international community on the whole often feel the need to “do something” (or at least say that they do).<sup>170</sup> In many ways, the history of R2P, which was created in the wake of genocide in Rwanda and Srebrenica, reflects this impulse to act after mass atrocity. While the impulse to react may be understandable, in some cases even honorable, when

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166. *Bosnian Genocide Case*, *supra* note 37, at ¶ 382.

167. *Id.*

168. *Id.* (“[C]omplicity always requires that some positive action has been taken to furnish aid or assistance to the perpetrators of the genocide, while a violation of the obligation to prevent results from mere failure to adopt and implement suitable measures to prevent genocide from being committed.”).

169. AUST, *supra* note 3, at 402.

170. Oona A. Hathaway & Scott J. Shapiro, *On Syria, a U.N. Vote Isn't Optional*, N.Y. TIMES (Sept. 3, 2013), <https://www.nytimes.com/2013/09/04/opinion/on-syria-a-un-vote-isnt-optional.html> (“The desire to respond to the atrocities in Syria with force is natural. The slaughter of civilians is impossible to watch without feeling morally impelled to act.”).

that “something” is military intervention, one of the tools at R2P’s disposal, it can be counterproductive at best and deadly at worst. It may escalate violence and civil strife. As the examples of the military intervention in Iraq and Libya demonstrate, the instability and power vacuums that sometimes follow military intervention can give rise to increased human rights abuses.<sup>171</sup>

In some cases, refraining from assisting others to do wrong might be a more effective way to limit casualties and restrain bloodthirsty State actors. This is likely to be the case when States would like to take action due to humanitarian concerns but have determined that no effective military solutions exist. One recent example of such a dilemma occurred when the United States wished to intervene in Syria after the Assad regime crossed a “red line” by using chemical weapons against its own people, but determined that military intervention would only further aggravate the suffering of the Syrian people.<sup>172</sup>

#### **D. Incorporating D2R into the Humanitarian Intervention Dilemma**

The incorporation of D2R into the calculus of whether military intervention is warranted when other States commit mass atrocity would result in more comprehensive and rational decision-making.<sup>173</sup> In the face of what Carlos Santiago Nino called “radical evil,” States—acting through the Security Council or unilaterally—are at times too quick to jump to military action even when it endangers lives, and do not fully think through creative alternatives that could limit the impact of would-be human rights abusers by depriving them of their instrumentality.<sup>174</sup> D2R creates much needed space for States that feel compelled to act in the wake of gross human rights violations to reflect

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171. Alan J. Kuperman, *Obama’s Libya Debacle: How a Well-Meaning Intervention Ended in Failure*, FOREIGN AFF. MAG., 2015, <https://www.foreignaffairs.com/articles/libya/obamas-libya-debacle> (“In retrospect, Obama’s intervention in Libya was an abject failure, judged even by its own standards. Libya has not only failed to evolve into a democracy; it has devolved into a failed [S]tate. Violent deaths and other human rights abuses have increased severalfold.”); *Iraq: A Decade of Abuses*, Amnesty Int’l, AI Index MDE 14/001/2013 (April 9, 2013), <https://www.amnestyusa.org/reports/iraq-a-decade-of-abuses/> [<https://perma.unl.edu/3J6X-PS82>].

172. Lesley Clark, *At West Point, Obama Argues for Restraint in Use of Military*, MIAMI HERALD (May 28, 2014), <http://www.miamiherald.com/latest-news/article1965132.html> [<https://perma.unl.edu/5HZW-EYU2>].

173. In contrast to R2P, scholars frequently evoke the term humanitarian intervention, to reference “the use of force by a [S]tate, a group of [S]tates, or an international organization in the territory of another [S]tate for the purpose of ending gross violations of human rights in the absence of a Security Council authorization, a claim of self-defense, or the consent of the host [S]tate.” Tzeng, *supra* note 152, at 426 (emphasis added).

174. See generally CARLOS SANTIAGO NINO, RADICAL EVIL (1998).

on the efficacy of that decision. D2R essentially requires a two-step process where States contemplating humanitarian intervention, through the Security Council or otherwise, must first engage in an analysis of whether such action will do more harm than good. In other words, stricter adherence to D2R principles would encourage States to examine critically how military intervention would curtail human rights violations before engaging in the use of force.

D2R also helps to fill in some of the legal gaps that R2P leaves. While some understand R2P to authorize humanitarian intervention anytime gross violations of human rights occur, there is not sufficient legal foundation to establish such a sweeping application of R2P.<sup>175</sup> Instead, the World Summit Outcome Document, which the U.N. Security Council has endorsed, “reinforces the legal obligations of Member States to refrain from the use of force except in conformity with the [U.N.] Charter.”<sup>176</sup> The U.N. Charter prohibits the use of force with a few exceptions, namely in self-defense, when a State consents to foreign intervention—for example in a status of forces agreement or when the Security Council sanctions it in the name of collective security.<sup>177</sup> Furthermore, in *Military and Paramilitary Activities*, the ICJ expressly held that humanitarian objectives alone cannot justify the use of force under international law.<sup>178</sup> Thus, the consensus among jurists and scholars is that there is insufficient State practice and *opinio juris* to support the existence of a customary norm of humanitarian intervention, absent authorization from the U.N. Security Council.<sup>179</sup>

Relying on the assent of the U.N. Security Council is an incomplete solution to gross human rights violations. Afterall, it was the Security Council’s inaction in the face of the mass atrocities in Rwanda and Bosnia that led to the creation of R2P in the first place.<sup>180</sup> At the same time, a broader understanding of the R2P, which would allow countries to use force absent Security Council authorization, is also un-

175. See, e.g., Carsten Stahn, *Responsibility to Protect: Political Rhetoric or Emerging Legal Norm?*, 101 AM. J. INT’L L. 99, 120 (2007) (“[T]he doctrine does not have the requisite [S]tate practice and *opinio juris* to support its existence in international law”); Tzeng, *supra* note 152, at 421 (“[M]ost scholars agree that humanitarian intervention does not have a legal basis in international law”).

176. *Implementing R2P*, *supra* note 159, at 5.

177. Tzeng, *supra* note 152, at 422.

178. *Id.* at 429–31 (quoting Nicaragua Case, *supra* note 135, at ¶ 268).

179. *Id.*

180. Mohamed, *supra* note 147, at 325 (“The greater obstacle was convincing the members of the Security Council to use their powers, to sacrifice political capital, resources, or even lives to protect individuals in far-off places. The ICISS therefore sought to reframe questions about intervention in order to inculcate an understanding in all [S]tates, and especially in powerful [S]tates, that protecting individuals from harm was a matter of duty, regardless of particular national interests.”).

workable because as Lea Brilmayer points out, it would essentially require all countries to monitor compliance with international law across the globe and intervene anywhere there is a violation of human rights.<sup>181</sup> She contends that the sheer volume of human rights violations worldwide makes that proposition unwieldy and impracticable.<sup>182</sup> More likely, States will choose to intervene when it suits them, which raises a separate concern about the selective application of the R2P principle.<sup>183</sup>

The concern about selection enforcement may also arise even when the U.N. Security Council has sanctioned military intervention for humanitarian reasons. As legal scholar Saira Mohamed points out, after the Security Council's adoption of Resolution 1973, which imposed a no-fly zone in Libya, then-President Obama argued that the United States had a "responsibility to act." At the same time, he stated that the United States is "naturally reluctant to use force to solve the world's many challenges. But when our interests and values are at stake, we have a responsibility to act."<sup>184</sup> While some have lauded the adoption of this resolution and Obama's subsequent statements as an endorsement of R2P, Mohamed raises an important critique. She fears that in line with this precedence, the Security Council will only intervene when the national interest of its members motivates them to do so without any consistent commitment.<sup>185</sup> If the Security Council does not dependably evoke R2P, there is a risk that it will become a vehicle for the permanent members of the Security Council to accomplish imperialist agendas and military objectives in the name of human rights.<sup>186</sup>

Because D2R does not require intervention, military or otherwise, it does not have the same political or economic costs as R2P. For that reason, States are more likely to evoke the principle consistently. Also, because D2R is a negative obligation, requiring States to refrain from activity, it provides a more realistic alternative to R2P, which puts the Security Council in the position of being the world's police. Pursuant to D2R, States are primarily responsible for their actions and must first do no harm. Only after careful consideration and thoughtful

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181. Lea Brilmayer & Isaias Yemane Tesfalidet, *Third State Obligations and the Enforcement of International Law*, 44 N.Y.U. J. INT'L L. & POL. 1, 38 (2011).

182. *Id.* at 39–41.

183. Mohamed, *supra* note 147, at 332.

184. President Barack Obama, Remarks by the President in Address to Nation on Libya (Mar. 28, 2011) (transcript available at <https://obamawhitehouse.archives.gov/the-press-office/2011/03/28/remarks-president-address-nation-libya> [<https://perma.unl.edu/9JHL-2RAG>]).

185. Mohamed, *supra* note 147, at 321, 330.

186. *Id.* at 321; see also Harold Koh, *The War Powers and Humanitarian Intervention*, 53 HOUS. L. REV. 971, 1003 (2016) (explaining his fear that States could use "murky concepts of humanitarian intervention and R2P for their own self-interested purposes").



weighing of the advantages and disadvantages, may the international community engage in humanitarian intervention. D2R mandates that States first explore other solutions that could curtail violence, such as withdrawing foreign aid or halting all sales of arms that might facilitate violence and human rights abuses.

## V. OBSTACLES TO PUNISHING STATE ACCOMPLICES

Despite the firm legal foundation that supports a more specific prohibition on State complicity in *jus cogens* violations, the judicial enforcement of this principle is weak.<sup>187</sup> By way of example, in its February 2007 review of decisions by international courts and other bodies invoking ARSIWA, the U.N. Secretary-General identified only one case in which ARSIWA's definition of State complicity for the acts of other States was referenced by an international body.<sup>188</sup> Part of the problem is that States rarely bring cases involving State complicity because the current international legal order is not conducive to them.<sup>189</sup> Still, weak enforcement is not an indication that D2R does not rise to the level of binding international law.<sup>190</sup> Rather, it is an indication of the need to strengthen the judicial and other avenues for enforcement.

The next two sections are devoted to this. In order to move the needle forward with respect to enforcement of D2R, in this Part I explore some of the obstacles to punishing State accomplices. In Part VI, I propose a number of solutions that will help to improve enforcement of D2R.

### A. The Methods of Enforcing International Law

Much has been written about the variety of forces that encourage compliance with international human rights law. Derek Jinks and

187. AUST, *supra* note 3, at 269 ("Due to some procedural peculiarities before international courts and tribunals, it could prove to be difficult to hold a complicit State responsible in international judicial forums."); *id.* at 376 ("Given the structure of Article 16 ASR and the obstacles attached to its implementation, especially before international courts and tribunals, Article 16 ASR may appear as some form of 'window dressing,' pretending to tackle a pressing issue but offering modest returns in terms of concrete and practical consequences.").

188. U.N. Secretary-General, *Responsibility of States for Internationally Wrongful Acts: Compilation of Decisions of International Courts, Tribunals and Other Bodies: Rep. of the Secretary-General*, ¶ 85, U.N. Doc. A/62/62 (Feb. 1, 2007) (citing Panel Report, Turkey—Restrictions on Imports of Textile and Clothing Products, WT/DS34/R ¶ 9.43 (May 31, 1999)). Notably, the ICJ decided the *Bosnian Genocide* case in February of 2007, so it was not included in this tally.

189. LANOVY, *supra* note 27, at 300.

190. AUST, *supra* note 3, at 296 ("The mere fact that no judicial avenue exists to hold a State responsible does not change the fact that there exists international responsibility.").

Ryan Goodman have focused on the soft enforcement through acculturation and socialization.<sup>191</sup> Oona Hathaway and Scott Shapiro have identified “outcasting,” that is, denying the benefits of social cooperation and membership to actors that violate international law, as an effective strategy to promote compliance with international law.<sup>192</sup>

While this Article focuses primarily on what Jinks and Goodman label coercive enforcement, or what I call hard enforcement (e.g. the adjudication of rights in international or domestic courts, economic sanctions, etc.), this is not meant to undermine the value of soft enforcement to norm internalization. Ideally, the design of soft and hard enforcement mechanisms would be complementary, with each pushing States toward internalized compliance. As Harold Koh points out, norm internalization is the preferred strategy of any regulatory system because it is low cost, but highly effective.<sup>193</sup> Vaughan Lowe explained the benefits of norm internalization with respect to State complicity, stating:

The bonds that tie us most effectively are those of which we are least aware, those with which we comply out of sheer habit. If I am right in believing that Article 16 ascribes responsibility to States, in some circumstances at least, for unlawful acts that are facilitated by the provision of foreign aid . . . it is likely that before very long it will become a matter of routine in donor States to review the legality of conduct of the recipient State that is materially facilitated by that aid. Such a bureaucratisation of the monitoring of compliance with international law, partial as it might be, would make a significant contribution to the entrenchment of the rule of law in the international community.<sup>194</sup>

There is at least some evidence that States have already internalized the rule on State complicity.<sup>195</sup>

I focus on hard enforcement mechanisms in this Article because often they are the first step in the transnational legal process, which slowly progresses toward norm internalization.<sup>196</sup> So while this Article focuses on hard enforcement measures, it does so with an eye toward ensuring that it complements and fortifies soft enforcement mechanisms like acculturation and norm internalization.

## B. Inherent Obstacles to Enforcement of Human Rights Law

There are a number of inherent challenges in enforcing international law that become even more acute when it comes to enforcing

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191. See generally Ryan Goodman & Derek Jinks, *How to Influence States: Socialization and International Human Rights Law*, 54 DUKE L.J. 621, 622 (2004).

192. See generally Oona Hathaway & Scott J. Shapiro, *Outcasting: Enforcement in Domestic and International Law*, 121 YALE L.J. 252, 255 (2011).

193. Harold Koh, *The 1998 Frankel Lecture: Bringing International Law Home*, 35 HOUS. L. REV. 623, 629 (1998).

194. See Lowe, *supra* note 20, at 14.

195. MOYNIHAN, *supra* note 10, at 4 (citing JACKSON, *supra* note 1, at 172).

196. Koh, *supra* note 193, at 644.

international human rights law. The primary challenge is the decentralized nature of international law. There is no central lawmaking body, tribunal, or single enforcer of the rules.<sup>197</sup> Since there is no overarching enforcer of international law, the enforcement of State responsibility has been primarily accomplished through bilateral treaties.<sup>198</sup> Indeed, empirical studies have found that compliance with bilateral treaties is higher than with multilateral treaties because bilateral treaties do not require enforcement by a third party.<sup>199</sup>

Instead, bilateral treaties are enforced through “joint gains” and reciprocity. Bilateral treaties are said to be self-enforcing because the parties will adhere to an agreement when each party has more to gain from continuing the agreement than from abrogating it.<sup>200</sup> A bilateral system of enforcement thus relies on the correlative rights and obligations owed between the parties to an agreement.<sup>201</sup> If a party breaches the agreement, then the other party will either stop fulfilling its obligations under the agreement or at least reduce the flow of benefits arising under the agreement.<sup>202</sup> So while there may be short-term benefits to breaching an agreement, the theory is that a State party will be deterred from breaching because the long-term costs of losing the reciprocal benefits of the agreement are greater than the short-term gains of a breach.<sup>203</sup> Bilateral treaties thus allow actors to realize long-term joint gains that they cannot otherwise achieve absent the agreement.<sup>204</sup> Reciprocity is thus an essential component of any bilateral agreement.

The significant reputational costs of breaching a bilateral agreement are also a deterrent.<sup>205</sup> States are sometimes discouraged from breaching agreements even when it would be to their advantage to do so because they fear that they will be viewed as unreliable or bad faith actors and other States will not want to enter into agreements with them. Yet, reciprocal compliance strategies are often ineffective when it comes to human rights enforcement. The joint gains and reciprocity theories of enforcement have much less traction when it comes to human rights law.<sup>206</sup> As traditionally cast, governments have few incentives to enter into bilateral agreements with other countries that

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197. BETH A. SIMMONS, *MOBILIZING FOR HUMAN RIGHTS: INTERNATIONAL LAW IN DOMESTIC POLITICS* 91, 114 (2009).

198. AUST, *supra* note 3, at 13.

199. *See, e.g.,* Oona A. Hathaway, *Do Human Rights Treaties Make A Difference?*, 111 *Yale L.J.* 1935 (2002).

200. SIMMONS, *supra* note 197, at 116.

201. JACKSON, *supra* note 1, at 13.

202. SIMMONS, *supra* note 197, at 116.

203. *Id.*

204. *Id.* at 125.

205. *Id.* at 117.

206. *Id.* at 125.

alter how they treat their own people. This is because countries do not rely on other countries to set their internal standard of rights.<sup>207</sup> Human rights treaties are seen as regulating activities that affect the common good as opposed to individual State interests and are often multilateral, rather than bilateral.

Multilateral human rights treaties face additional barriers to enforcement, which result in a compliance deficit. They often suffer from a collective action problem. Peer enforcement by State parties is weak because the costs of enforcement are high and the benefits of compliance are minimal.<sup>208</sup> Other State parties are deterred from intervening when a violation of a human rights treaty occurs because enforcement is expensive militarily, economically, and politically.<sup>209</sup> In addition, States may have divergent opinions about the gravity of violations and different relationships with the offending regime. For example, a State party may not want to punish a human rights abusing State if it is an ally or trading partner. Thus, the targets of human rights enforcement are generally smaller countries with little political power or economic might.<sup>210</sup> In addition, the reputational costs of breaching a human rights treaty as compared to other types of treaties are minimal.<sup>211</sup> As Downs and Jones have explained, compliance with trade agreements is not highly correlated with compliance with human rights treaties, so a State would not necessarily assume that because another State breaches a human rights treaty that it will also be an unreliable trading partner.<sup>212</sup>

### C. The Collective Action Problem with Respect to State Complicity

The same collective action problem that plagues human rights treaties also ails the enforcement of the rules on State complicity. Numerous scholars portray bilateralism as the main obstacle to both the adoption and enforcement of State complicity rules, generally. First, they attribute the late emergence of the law on State complicity in international wrongdoing to the bilateral nature of international law.<sup>213</sup> The development of a rule on State responsibility for complicity, according to the standard argument, was delayed because under a bilateral enforcement regime, the rights and responsibilities of third States remained undefined.<sup>214</sup> Indeed, the inclusion of the obligation

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207. *Id.* at 122.

208. *Id.* at 122, 125.

209. *Id.* at 122.

210. *Id.*

211. *Id.* at 124.

212. *Id.*

213. AUST, *supra* note 3, at 12–14.

214. *Id.*

not to assist in the commission of international crimes in the 1996 Draft Articles of the ILC was characterized as “a remarkable victory of community interest over bilateralist reflexes,” precisely because it impacted the rights and duties of “third States.”<sup>215</sup>

Legal scholars attribute the lack of enforcement of State complicity rules to bilateralism. For example, Helmut Phillip Aust asserts that effective implementation of the rules on State complicity is lacking because of the bilateral orientation of international judicial proceedings.<sup>216</sup> This critique is not unfounded. As I will detail below, the ICJ is not equipped to resolve disputes that involve a multiplicity of actors and as a result, cannot adequately address the complexity of the modern world where the cooperation of States has increased.<sup>217</sup> Similarly, the *pacta tertiis* rule, which limits treaty obligations to State parties, means that non-party third States enjoy impunity.<sup>218</sup> As a result of this consent-oriented system of international dispute resolution, even egregious examples of State complicity will escape punishment.<sup>219</sup> To scholars advocating for rules on State complicity, bilateralism is the evil that prevents States from acting in the common good of the global community. For example, in Miles Jackson’s view, the bilateral focus of international law has resulted in States paying “attention only to the wrongs they commit and not to the wrongs they help other [S]tates to commit.”<sup>220</sup>

The rejection of bilateralism and full embrace of multilateral agreements might be shortsighted. Multilateral agreements pose some inherent risks. Because of the structural flaws of the United Nations, which rests decision-making authority with the Security Council when peace and security are threatened, the chances that State complicity will be addressed collectively are slim.<sup>221</sup> In the face of Security Council inaction, States may be emboldened to act unilaterally, but in the name of the international community. To some extent, international law permits this response. When a breach of *jus cogens* norms occurs, States have a right, pursuant to their *erga omnes* obligations, to employ countermeasures (at least as long as they do not involve the use of force).<sup>222</sup> In theory, these countermeasures are taken in the collective interest of the international community as the breaches constitute a threat to peace and security, which concerns all States.<sup>223</sup>

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215. *Id.* at 25.

216. *Id.* at 378.

217. *Id.*

218. JACKSON, *supra* note 1, at 13.

219. AUST, *supra* note 3, at 378.

220. JACKSON, *supra* note 1, at 174.

221. AUST, *supra* note 3, at 367–69.

222. *Id.* at 367.

223. *Id.*

Unfortunately, there is a risk that States enforcing the rules on State complicity will justify actions taken in their own self-interest as acts taken on behalf of the world community.<sup>224</sup> Numerous scholars have articulated this fear. Special Rapporteur Millem Riphagen worries that States might take it upon themselves to become the world's policeman on behalf of the international community, just as they have with R2P.<sup>225</sup> Michael Akehurst has expressed concern that intervening States will "tend to support their allies, rather than the side which was objectively in the right," consequently weakening international law and increasing international tension.<sup>226</sup> Or as Miles Jackson put it, it would give powerful States with resources the right to "form a world order to their liking."<sup>227</sup>

#### D. Unprincipled Jurisdictional Gaps

One of the biggest obstacles to enforcing the rules on State complicity is the set of jurisdictional hurdles that inhibit courts from adjudicating them.<sup>228</sup> Jurisdictional rules limit the ability of both individuals and other States from bringing cases involving State complicity. The problem is so severe that the ILC has gone so far as saying "States are entitled to assert complicity in the wrongful conduct of another State even though no international court may have jurisdiction to rule on the charge."<sup>229</sup>

Jurisdictional barriers exist both at the regional and international levels. The regional systems that adjudicate State responsibility for human rights violations are often unable to address cases involving State complicity in internationally wrongful acts due to their reliance on the territoriality principle. Traditionally, if a court evokes jurisdiction based on the territoriality principle, the offensive act must have some connection to the offending State's territory.<sup>230</sup> Both the European Court of Human Rights (ECtHR) and the Inter-American human rights system (composed of the Inter-American Commission on Human Rights (IACHR) and the Inter-American Court of Human

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224. *Id.* at 372.

225. *Id.* at 367–68.

226. *Id.* at 370 (quoting Michael Akehurst, *Reprisals by Third States*, 44 BRIT. Y.B. INT'L L. 1, 15–16 (1970)).

227. *Id.*

228. Samuel Shepson, *Jurisdiction in Complicity Cases: Rendition and Refoulement in Domestic and International Courts*, 53 COLUM. J. TRANSNAT'L L. 701, 705–06 (2015) ("But in both international and domestic courts, individuals whose human rights have been violated with the support of a complicit [S]tate have had their claims against the complicit [S]tate actor dismissed for want of jurisdiction or as non-justiciable.").

229. See Draft Articles, *supra* note 8, art. 16, cmt. 11, at 67.

230. Michael Akehurst, *Jurisdiction in International Law*, 46 BRIT. Y.B. INT'L L. 145, 152–53 (1972).

Rights (IACtHR)) employ this jurisdictional principle and only allow for extraterritorial application of their respective human rights treaties when a State party has effective control of the jurisdiction where the human rights violations take place.<sup>231</sup>

The application of this principle limits these courts' ability to address State complicity. In cases involving State complicity, State accomplices are typically aiding and abetting crimes that, by definition, occur when the State accomplice does not have control over the jurisdiction where the violations occurred. Indeed, one of the reasons that a State might assist another State to perpetrate grave crimes is because that State does not have control over a territory or area that implicates its national interest. If a complicit State is facilitating the crimes of another State in that State's jurisdiction, it is unlikely that the State perpetrator will take the complicit State to task for its wrongdoing. As a result, Miles Jackson argues that there is an "unprincipled gap" in the jurisdictional reach of the ECtHR and the Inter-American system.<sup>232</sup>

A similar "unprincipled gap" exists with regard to enforcement of the International Covenant on Civil and Political Rights (ICCPR). Using similar language as the jurisdictional provision in the European Convention on Human Rights (ECHR), Article 2 of the ICCPR requires State parties "to respect and to ensure" the rights in the Covenant "to all individuals within its territory and subject to its jurisdiction." The State parties to the Covenant deliberately chose this language. Although France and China opposed its inclusion, the

231. Article 1(1) states that the American Convention on Human Rights covers "all persons subject to [the] jurisdiction" of the State parties. American Convention on Human Rights: "Pact of San José, Costa Rica" art. 1(1), Nov. 22, 1969, 1144 U.N.T.S. 144. Yet, the IACHR has held that a State party to the Convention "may be responsible under certain circumstances for the acts and omissions of its agents which produce effects or are undertaken outside that [S]tate's own territory." *Saldaño v. Argentina*, Inter-Am. Comm'n H.R., Report No. 38/99, OEA/Ser.L/V/II.95 doc. 7 rev. at ¶ 17 (1999). Instead, the IACHR has also found that jurisdiction is "a notion linked to authority and effective control, and not merely to territorial boundaries," and that the focus should be on whether the State has "authority" and "control" over the person. *Id.* at ¶ 19. The American Declaration does not include a jurisdictional provision, but the Inter-American Commission has applied the same focus on "authority and control." *See, e.g., Coard v. United States*, Case 10.951, Inter-Am. Comm'n H.R., Report No. 109/99, OEA/ser.L/V/II.106, doc. 3 rev. at ¶ 37 (1999); *Alejandro v. Cuba*, Case 11.589, Report No. 86/99, OAS/Ser.L/V/II.104 doc. 10 rev. at ¶ 23 (1999). The ECtHR has established a similar precedent with regard to extraterritorial jurisdiction. Sarah Miller, for instance, describes all exceptions to the general requirement that there be a territorial nexus with the signatory State's physical terrain and the individuals whose rights are implicated. Sarah Miller, *Revisiting Extraterritorial Jurisdiction: A Territorial Justification for Extraterritorial Jurisdiction Under the European Convention*, 20 EUR. J. INT'L L. 1223 (2009).

232. Miles Jackson, *Freeing Soering: The ECHR, State Complicity in Torture and Jurisdiction*, 27 EUR. J. INT'L L. 817, 821–22 (2016).

United States insisted on adding “within its territory.”<sup>233</sup> In part, the United States feared that State parties would be emboldened to become the world’s police for human rights violations.<sup>234</sup>

As a consequence of this addition, the reach of the ICCPR, and thereby the jurisdiction of the Human Rights Committee that monitors compliance with the ICCPR, is limited to acts within the territory of its State party members. However, in at least one instance, the Human Rights Committee went further than the ECtHR and the IACHR in extending its jurisdiction. In *Euben Lopez Burgos v. Uruguay*, the Committee found that Uruguay had violated ICCPR when its agents abducted its own citizens and transported them back to the country.<sup>235</sup> The Committee reasoned that “the reference in that [A]rticle is not to the place where the violation occurred, but rather to the relationship between the individual and the State in relation to a violation of any of the rights set forth in the Covenant, wherever they occurred.”<sup>236</sup>

Arguably, carving out a special rule for D2R could potentially overcome some jurisdictional limitations present before these decision-making bodies. Instead of adopting the territoriality principle, these entities could exercise universal jurisdiction over these cases. By its very nature, universal jurisdiction requires “no link of territoriality or nationality between the State and the conduct of the offender, nor is the State seeking to protect its security or credit.”<sup>237</sup> As Cherif Bassiouni has asserted, courts have universal jurisdiction over crimes that violate *jus cogens* norms “irrespective of where they were committed, by whom (including Heads of State), against what category of victims, and irrespective of the context of their occurrence (peace or war).”<sup>238</sup> The underlying legal theory of universal jurisdiction is that some crimes are so “threatening to the international community or so heinous in scope and degree that they offend the interest of all humanity.”<sup>239</sup> Thus, a court exercising universal jurisdiction does not act in

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233. Nahapetian, *supra* note 40, at 112.

234. *Id.*

235. MANFRED NOWAK, U.N. COVENANT ON CIVIL AND POLITICAL RIGHTS: CCPR COMMENTARY 41 n.73 (1993) (citing Sergio Euben Lopez Burgos v. Uruguay, Comm. No. R. 12/52, ¶ 12.3 (June 6, 1979), U.N. Doc. Supp. No. 40 (A/36/40), at 176 (1981); Lilian Celiberti de Casariego v. Uruguay, Comm. No. R. 13/56, ¶ 10.3 (July 17, 1979), U.N. Doc. Supp. No. 40 (A/36/40), at 185 (1981)).

236. Sergio Euben Lopez Burgos v. Uruguay, *supra* note 235, at ¶ 12.2.

237. LUC REYDAMS, UNIVERSAL JURISDICTION: INTERNATIONAL AND MUNICIPAL LEGAL PERSPECTIVES 5 (2003); *see also* Ingrid Wuerth, *Kiobel v. Royal Dutch Petroleum Co.: The Supreme Court and the Alien Tort Statute*, 107 AM. J. INT’L L. 601, 619 (2013) (explaining that universal jurisdiction “is not based on (or limited by) an important or distinct interest of the forum [S]tate”).

238. Bassiouni, *supra* note 21, at 66.

239. Michael P. Scharf, *Application of Treaty-Based Universal Jurisdiction to Nationals of Non-Party States*, 35 NEW ENG. L. REV. 363, 368 (2001).



its own name *uti singulus* (a special interest), but as an agent of the international community.<sup>240</sup> Thus far, universal jurisdiction has been limited to criminal prosecutions of individuals in foreign courts, but in light of the growth of State responsibility, in the future it could extend to cases involving D2R.

Miles Jackson proposes another novel idea to close this “unprincipled gap.” He argues that the ECtHR jurisprudence, which addresses torture that occurs extraterritorially, should be extended to other crimes that implicate *jus cogens* norms.<sup>241</sup> The seminal case on this subject is the *Soering* case. In that case, the ECtHR held that a State who extradites an individual could be held liable if it was reasonably foreseeable that the claimant could face a real risk of torture or inhuman and degrading treatment in the receiving State.<sup>242</sup> Jackson argues that the *Soering* principle should be re-imagined as “a preventive complicity rule,” which could possibly be extended to cases where the conduct of a complicit State will foreseeably result in a violation of a fundamental right enshrined in the ECHR.<sup>243</sup> The ECtHR held as much when it concluded that State parties were complicit in torture in violation of the ECHR when they assisted another State who engaged in torture. Specifically, in *El-Masri*, *Al Nashiri*, and *Husayn*, the ECtHR concluded that Macedonia, Romania, and Poland violated the ECHR when they assisted the United States to carry out its rendition program because it was foreseeable that those rendered would be tortured.<sup>244</sup>

In addition to the jurisdictional gaps at the ECtHR, the IASHR, and the Human Rights Committee, there is also a significant gap in the jurisdictional reach of the ICJ, which prevents it from adjudicating many cases involving State complicity. Specifically, in the *Case of the Monetary Gold*, the ICJ ruled that it could not adjudicate a liability claim if in order to do so it would have to rule on the lawfulness of the conduct of another State who was not a party in the proceedings and had not consented to the Court’s jurisdiction.<sup>245</sup> The *Monetary*

240. Georges Abi-Saab, *The Proper Role of Universal Jurisdiction*, 1 J. INT’L CRIM. JUST. 3, 596, 601 (2003).

241. Jackson, *supra* note 232.

242. *Soering v. United Kingdom*, App. No. 14038/88, 161 Eur. Ct. H.R. (ser. A) at 30 (1989).

243. Jackson, *supra* note 232, at 830.

244. André Nollkaemper, *Complicity in International Law: Some Lessons from the U.S. Rendition Program*, 109 AM. SOC’Y INT’L L. PROC. 177, 180 (2015).

245. *Monetary Gold Removed from Rome in 1943* (It. v. Fr., U.K., and U.S.), Preliminary Question, 1954 I.C.J. Rep 19 (June 15). For a discussion of the potential impact of *Monetary Gold* on the possibility of the injured State taking countermeasures against the assisting State, see Christian J. Tams, *Countermeasures Against Multiple Responsible Actors*, in PRINCIPLES OF SHARED RESPONSIBILITY IN INTERNATIONAL LAW: AN APPRAISAL OF THE STATE OF THE ART 331–32 (André Nollkaemper & Ilias Plakokefalos eds. 2014).

*Gold* principle, sometimes called the indispensable third party principle, reflects the bilateral nature of international law enforcement, in which there are two parties, with one on either side of a dispute. Since State complicity intrinsically involves at least three actors, many cases of State complicity fall into this jurisdictional black hole. The ILC, in its Commentary to Article 16, recognized that this precedent could “present some practical difficulties in some cases in establishing” State responsibility under Article 16.<sup>246</sup>

Even cases that implicate *jus cogens* norms or obligations *erga omnes* are not exempt from the effects of *Monetary Gold*. Arguably, because States need not consent to *jus cogens* norms in order to be bound by them, *Monetary Gold* should not affect the Court’s ability to adjudicate a case involving *jus cogens* violations. However, the ICJ has made a distinction between consent to a legal obligation and consent to the ICJ jurisdiction, finding “that the fact that a dispute relates to compliance with [*jus cogens* norms], which is assuredly the case with regard to the prohibition of genocide, cannot of itself provide a basis for the jurisdiction of the Court to entertain that dispute.”<sup>247</sup> Similarly, the ICJ has found that the *erga omnes* character of a norm and the rule of consent to jurisdiction are not related and as such would “not rule on the lawfulness of the conduct of a State when its judgment would imply an evaluation of the lawfulness of the conduct of another State which is not a party to the case . . . even if the right in question is a right *erga omnes*.”<sup>248</sup>

To some extent, D2R overcomes this obstacle because a number of *jus cogens* norms that D2R addresses are codified in treaties, which include clauses that confer jurisdiction on the ICJ. For example, the Genocide Convention grants jurisdiction to the ICJ to resolve disputes concerning responsibility for genocide.<sup>249</sup> Similarly, the Convention against Torture (CAT) includes a jurisdictional clause that allows State parties to refer a dispute arising under the treaty to the ICJ should arbitration fail.<sup>250</sup> The Slavery Convention and its supplement-

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246. See Draft Articles, *supra* note 8, art. 16, cmt. 11, at 67.

247. Case Concerning Armed Activities on the Territory of the Congo (Democratic Republic of the Congo v. Rwanda), 2002 I.C.J. 126 (Sept. 18) (New Application: 2002).

248. East Timor (Port. v. Austl.), Judgment, 1995 I.C.J. 90, ¶ 29 (June 30).

249. Article IX of the Genocide Convention provides that the ICJ has jurisdiction in matters “relating to the interpretation, application or fulfillment of the present Convention, including those relating to the responsibility of a State for genocide or for any of the other acts enumerated in article III . . . .” Convention on the Prevention and Punishment of the Crime of Genocide art. IX, Dec. 9, 1948, 78 U.N.T.S. 277.

250. Article 30 of the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment provides that “[i]f within six months from the date of the request for arbitration the Parties are unable to agree on the organization of the arbitration, any one of those Parties may refer the dispute to the

tal convention both include provisions stipulating that disputes arising under these treaties should be referred to the ICJ if these disputes are unable to be resolved through negotiations.<sup>251</sup> Still, all breaching States are necessary parties to a case involving State complicity, so both the complicit State and the State perpetrators must be joined to any case arising from the aforementioned treaties.

## VI. PROPOSED ENFORCEMENT OF STATE ACCOMPLICE LIABILITY

In light of the existing obstacles that prevent State complicity cases from going forward before the main tribunals that address State responsibility (e.g. the ICJ, the ECtHr, and the IASHR) and human rights more generally, I contend that the enforcement of D2R may be better achieved through other means. This Part proposes other options for the enforcement of D2R, which must be understood within the broader frame of the compliance deficit that affects human rights law more generally.

### A. Bilateral Agreements Prohibiting State Complicity in Grave Crimes

This Article contends that the belief that bilateralism is incompatible with the advancement of collective concerns of the international community has resulted in a missed opportunity: the enforcement of State complicity laws through bilateral agreements. Bilateral agreements that incorporate D2R principles hold a lot of potential for more robust adherence to human rights principles. Generally, the strength of bilateral enforcement mechanisms centers on the ability of States to take countermeasures aimed at inducing other States to resume their obligations or compliance with agreements.<sup>252</sup> Under this bilateral system, when one State breaches an agreement, the injured State is

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International Court of Justice by request in conformity with the Statute of the Court.” Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment art. 30, Dec. 10, 1984, 1465 U.N.T.S. 85.

251. Article 8 of the Slavery Convention of 1926 requires that disputes, “if they cannot be settled by direct negotiation, be referred for decision to the Permanent Court of International Justice.” Slavery Convention of 1926 art. 8, Sept. 25, 1926, 60 L.N.T.S. 253. Similarly, Article 10 of the Supplementary Convention on the Abolition of Slavery provides that “[a]ny dispute between States Parties to this Convention relating to its interpretation or application, which is not settled by negotiation, shall be referred to the International Court of Justice at the request of any one of the parties to the dispute, unless the parties concerned agree on another mode of settlement.” Supplementary Convention on the Abolition of Slavery, the Slave Trade and Institutions and Practices Similar to Slavery of 1956 art. 10, Sept. 7, 1956, 226 U.N.T.S. 3.

252. AUST, *supra* note 3, at 366.

entitled to self-help measures against the State perpetrator.<sup>253</sup> In addition, these bilateral agreements could include jurisdictional provisions conferring jurisdiction to the ICJ when a dispute occurs, thus overcoming some of the barriers presented by the *Monetary Gold* principle because both parties would have consented to ICJ jurisdiction over the dispute.

If D2R was incorporated into bilateral treaties, it could take two forms. First, a D2R clause could be inserted into foreign aid agreements that would entitle a donor State to suspend or terminate an agreement if the recipient State committed a grave crime.<sup>254</sup> Arms agreements could also include D2R clauses that would prohibit recipient States from using the arms they receive in grave crimes, similar to the provisions in the ATT.<sup>255</sup> Whereas typically a State may only terminate or suspend a treaty when the other State commits a material breach, when the breach of a treaty involves *jus cogen* violations, the non-breaching State has an obligation to suspend or terminate the treaty.<sup>256</sup> Pursuant to Draft Article 41(2), States that continue their assistance or provisions of arms after mass atrocities occur could be considered accessories after the fact.<sup>257</sup> Such clauses would ensure that donor States are not bound to an aid agreement that might make them complicit in the grave crimes of other States. In this case, States are not acting on behalf of the international community, but instead in their own interest of not wanting to incur responsibility for State complicity.<sup>258</sup>

There is some precedence to support the formation of agreements with these clauses. After learning that Israel had used cluster bombs in Lebanon, the United States reportedly suspended shipment of weapons until it negotiated an unpublished agreement, which barred Israel from using U.S. supplied bombs in civilian areas.<sup>259</sup> The Netherlands suspended economic aid and military subsidies to Suriname after evidence of human rights violations emerged.<sup>260</sup> The United States halted aid to Uganda, when it was controlled by notorious human rights abuser Idi Amin, and Indonesia after it invaded East Timor.<sup>261</sup> Codifying this precedence into a standard clause that States could be encouraged to include in all of their foreign aid agree-

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253. *Id.*

254. *Id.* at 372.

255. *See, e.g., ATT, supra* note 125.

256. LANOVY, *supra* note 27, at 298.

257. Draft Articles, *supra* note 8, art. 41(2).

258. AUST, *supra* note 3, at 372.

259. Cluster bombs are suspect under international humanitarian law because, on explosion, they indiscriminately scatter small particles of flying metal, frequently causing injury to civilians. Quigley, *supra* note 38, at 91.

260. LANOVY, *supra* note 27, at 294.

261. *Id.* at 294–95.

ments would ostensibly create pressure on principal States to refrain from abuses, but they would also indirectly constrain potential complicit States wishing to be seen as good faith actors.

Second, a bilateral treaty addressing D2R could also be an effective strategy when a conflict is entangled with a broader proxy war. In many of the instances of State complicity mentioned in Part I, the conflict escalated because there were States with strategic geopolitical interests on both sides of the conflict acting in the shadows. In these scenarios, a sort of brinkmanship approach to foreign or military assistance may be at work: when one side becomes involved, the other feels compelled to aid the actor they support. Our world's history is filled with such examples, with the foreign aid strategies of the United States and Russia during the Cold War being a notable one.<sup>262</sup> Sometimes, these power struggles result in powerful State actors supporting States with fewer resources to commit grave crimes. This was the case in Guatemala, where the United States gave aid to Guatemala—ultimately increasing its capacity to commit atrocities against indigenous communities—because it feared that Cuba and Russia were arming “communists” who would overthrow the Guatemalan government.<sup>263</sup>

The creation of a bilateral treaty, where the foreign governments on either side of a conflict agree not to arm allies who are suspected of committing grave crimes, might have been an effective strategy in the intractable conflict in Syria. In August 2012, after President Obama publicly stated that Syrian President Bashar Al-Assad had crossed “a red line” when he used chemical weapons on his own people, the United States contemplated military intervention.<sup>264</sup> White House Counsel under the Obama administration concluded that, under the circumstances, military intervention was “‘justified and legitimate under international law’ and so not prohibited.”<sup>265</sup> Despite these statements early on, President Obama later expressed his belief that there was no viable military solution and ultimately intervention would only aggravate the conflict, thereby resulting in more violations

262. Peter J. Meyer, CONG. RESEARCH SERV., R44647, U.S. FOREIGN ASSISTANCE TO LATIN AMERICA AND THE CARIBBEAN: RECENT TRENDS AND FY2016 APPROPRIATIONS (2016) (“U.S. assistance to [Latin America] spiked in the early 1960s following the introduction of President John F. Kennedy’s Alliance for Progress, an anti-poverty initiative that sought to counter Soviet and Cuban influence in the aftermath of Fidel Castro’s 1959 seizure of power in Cuba.”).

263. Raymond Bonner, *President Approved Policy of Preventing ‘Cuba-Model States,’* N.Y. TIMES (Apr. 7, 1983), <http://www.nytimes.com/1983/04/07/world/president-approved-policy-of-preventing-cuba-model-states.html?mcubz=1>.

264. Mark Landler, *Obama Threatens Force Against Syria*, N.Y. TIMES (Aug. 20, 2012), <http://www.nytimes.com/2012/08/21/world/middleeast/obama-threatens-forceagainsyria.html>.

265. Koh, *supra* note 186, at 999–1000.

of human rights.<sup>266</sup> Many other leaders, ranging from Russian Prime Minister Vladimir Putin to the Pope, came to the same conclusion.<sup>267</sup> Particularly in this case, where the forces in opposition to Assad are believed to have committed their own atrocities, it may be more effective to limit the capacity of human rights abusers by depriving both sides of resources.<sup>268</sup> In this scenario, where both Russia and the United States agreed that there was no military solution to the situation in Syria, might it have been possible to negotiate a bilateral agreement where both the United States and Russia agreed to refrain from aiding either side?

While, admittedly, this might be a long shot, there is some reason to believe that such an agreement might be possible under the right political circumstances. After all, in July of 2017, U.S. President Trump and Russian President Vladimir Putin negotiated a cease-fire agreement in southwest Syria.<sup>269</sup> Certainly, the motivation for the agreement was not all altruistic. Part of the impetus for the agreement came from the political pressure that the leaders felt to portray their first meeting as a success.<sup>270</sup> Another example of a possible D2R forward agreement occurred earlier in 2017 when Russia, Turkey, and Iran came to an agreement to establish “de-escalation zones” in Syria in an effort to reduce bloodshed.<sup>271</sup>

## B. Overcoming the Veto Power of the Security Council

As previously mentioned, another compounding factor to the impunity gap for State complicity in grave crimes is the decision-making structure in the United Nations. The existing system concentrates decision-making authority in the hands of a few powerful States that exercise veto power in the Security Council (Russia, China, the United States, France, and the United Kingdom).<sup>272</sup> As the examples of State complicity elucidated above demonstrate, many of these actors have

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266. Clark, *supra* note 172.

267. See, e.g., Barbara Crossette, *There Is No Military Solution for Syria*, NATION (Mar. 18, 2016), <https://www.thenation.com/article/there-is-no-military-solution-for-syria/> [https://perma.unl.edu/NF9P-RF2A]; *Putin Meets Jordan King, Says No Military Solution to Syria Crisis*, PRESS TV (Jan. 26, 2017), <http://www.presstv.ir/Detail/2017/01/26/507828/Syria-Jordan-king-Russia-Astana-peace-Saudi-Arabia> [https://perma.unl.edu/JCV3-7VQJ].

268. Alison Meuse, *U.N. Report Says Syrian Forces and Rebel Factions Committed Aleppo 'War Crimes'*, NPR (Mar. 3, 2017), <http://www.npr.org/sections/parallels/2017/03/03/518134951/u-n-report-says-syrian-forces-and-rebel-factions-committed-aleppo-war-crimes> [https://perma.unl.edu/K7DX-CCHH].

269. Josh Lederman, *US, Russia announce Syria cease-fire after Trump-Putin talks*, AP (July 7, 2017), <https://www.apnews.com/ea310ccb6e04e0580759d4ce36e778b> [https://perma.unl.edu/LP8Z-7A3X].

270. *Id.*

271. *Id.*

272. U.N. Charter art. 27.

been accused of being State accomplices to grave crimes. Indeed, some of them have used their veto power to protect their allies that commit atrocities. For example, we saw this recently with the resolutions regarding the investigation of the Assad regime's use of chemical weapons against his people. Russia, which has a geopolitical interest in Syria, has again and again prevented the United Nations from condemning the atrocities in Syria and calling on the Assad regime to cooperate with an international investigation into the use of chemical weapons.<sup>273</sup> As a result, the world's security has become threatened by the Assad regime's crimes.

In the context of promoting R2P, some scholars have proposed that the U.N. General Assembly should exercise its authority under the Uniting for Peace Resolution to counteract the inaction of the Security Council when grave crimes that threaten collective security occur. This Resolution provides:

[T]hat if the Security Council, because of lack of unanimity of the permanent members, fails to exercise its primary responsibility for the maintenance of international peace and security in any case where there appears to be a threat to the peace, breach of the peace or act of aggression, the General Assembly shall consider the matter immediately with a view to making appropriate recommendations to Members for collective measures, including in the case of a breach of the peace or act of aggression the use of armed force when necessary, to maintain or restore international peace and security.<sup>274</sup>

In his report on *Implementing the Responsibility to Protect*, the U.N. Secretary General underscored the ability of the General Assembly, acting under the "Uniting for Peace" procedure, to act "when the Council fails to exercise its responsibility with regard to international peace and security because of the lack of unanimity among its five permanent members."<sup>275</sup> The ICJ, in its *Certain Expenses and Wall* advisory opinions, affirmed the General Assembly also has responsibility for the maintenance of international peace and security and can "recommend measures for the peaceful adjustment."<sup>276</sup>

Similarly, the ICISS, in its report on R2P, concluded that the General Assembly has fallback authority to take action to maintain peace and security and concluded that, although the Assembly has only hortatory powers, "an intervention which took place with the backing of a two-thirds vote in the General Assembly would clearly have powerful

273. Euan McKirdy, *8 Times Russia Blocked a UN Security Council Resolution on Syria*, CNN (Apr. 13, 2017), <http://www.cnn.com/2017/04/13/middleeast/russia-unsc-syria-resolutions/index.html> [https://perma.unl.edu/NDC2-3WCL].

274. G.A. Res. 377 (V), ¶ 1 (Nov. 3, 1950).

275. Implementing *R2P*, *supra* note 159, at ¶¶ 61, 63.

276. Tzeng, *supra* note 152, at 420 (citing *Certain Expenses of the United Nations*, Advisory Opinion, 1962 I.C.J. 151, 163 (July 20) and *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, Advisory Opinion, 2004 I.C.J. 136, T 26 (July 9)).

moral and political support.”<sup>277</sup> Furthermore, the ICISS Report characterized the ability of the General Assembly to recommend intervention as an “important additional form of leverage on the Security Council to encourage it to act decisively and appropriately.”<sup>278</sup>

Yet, the ability of the General Assembly to act is still restrained by the prohibition on the use of force. As explained in two later reports by Secretary-General Ban Ki-moon in 2012 and 2015, “the Security Council is the sole U.N. organ that has the power to authorize the use of force, under Chapter VII, Article 42, of the Charter.”<sup>279</sup> The General Assembly may only adopt a non-binding resolution urging the use of force to address a humanitarian crisis.<sup>280</sup> However, such a resolution does not in itself justify the use of force by any State.<sup>281</sup> Under Article 11(2) of the U.N. Charter, the General Assembly may discuss and recommend actions that it believes will promote international peace and security but must defer to the Security Council if any military intervention is necessary.<sup>282</sup>

Despite this limitation with respect to military intervention under R2P, the Uniting for Peace Resolution could be an effective tool for the implementation of D2R. Indeed, although the Secretary-General has expressed his view that the Resolution does not permit the General Assembly to authorize a military intervention, he does view the General Assembly as an appropriate forum to consider sanctions that fall short of military force.<sup>283</sup> The General Assembly thus could be a forum where individual member States coordinate sanctions against a State Accomplice to grave crimes when the Security Council fails to authorize military or other action under R2P.<sup>284</sup> In addition, the General Assembly has primary authority over membership in the United Nations. Article 18 grants the power to suspend the right and privi-

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277. Mehrdad Payandeh, *With Great Power Comes Great Responsibility? The Concept of the Responsibility to Protect Within the Process of International Lawmaking*, 35 YALE J. INT'L L. 469, 504 (2010).

278. *Id.*

279. *Id.* (“The High-Level Panel, the Secretary-General, and the World Summit unequivocally confirm that the Security Council is the sole organ that can authorize the use of force.”); Tzeng, *supra* note 152, at 425 (citing U.N. Secretary-General, *Responsibility to Protect: Timely and Decisive Response*, 132, U.N. Doc. A/66/874-S/2012/578 (July 25, 2012)).

280. Chelsea Koester, *Looking Beyond R2P for an Answer to Inaction in the Security Council*, 27 FLA. J. INT'L L. 377, 396 (2015).

281. *Id.* (citing Payandeh, *supra* note 277, at 503).

282. U.N. Charter art. 11, ¶¶ 1–2.

283. Payandeh, *supra* note 277, at 504 (citing *Implementing R2P*, *supra* note 159, at ¶ 57).

284. *Id.* at 504–05.



leges of membership and even to expel member States.<sup>285</sup> This too could be an effective tool in implementing D2R.

## VII. CONCLUSION

The United States, United Kingdom, and France have all condemned Russia's involvement in the war crimes perpetrated by the Assad regime in Syria. Similarly, the international human rights community has decried China's role in arming the Sudanese army that committed mass atrocity in Darfur. Despite the outrage over the role that these State accomplices have played in the mass murder perpetrated by another State, the avenues available to punish these State accomplices remains limited.

In this Article, I propose a novel theory for closing this impunity gap. I argue that States have a duty to refrain from aiding and abetting other States who commit *jus cogens* violations, like genocide and crimes against humanity. As documented in this Article, there is robust evidence of the emergence of a binding principle concerning State responsibility for complicity in the grave crimes of other States, but it has yet to be treated as a separate principle from the general prohibition on State complicity in international wrongdoing. I argue that delineating a more specific D2R rule will ensure more effective enforcement of the principle. In addition, this Article also makes a significant contribution to the literature by exploring the factors that contribute to impunity for State complicity in grave crimes. To resolve these challenges, I propose an embrace of bilateral agreements. While these treaties are typically seen as contrary to the rules that govern State complicity, a bilateral agreement that incorporates provisions meant to instrumentalize D2R could be an important tool for enforcement. In addition, I argue that the Uniting for Peace Resolution authorizes the General Assembly to take measures to punish State accomplices, including members of the Security Council who use their veto power to protect allies that commit grave crimes.

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285. Certain Expenses of the United Nations, Advisory Opinion, 1962 I.C.J. 151, 163 (July 20) ("In connection with the suspension of rights and privileges of membership and expulsion from membership under Articles 5 and 6, it is the Security Council which has only the power to recommend and it is the General Assembly which decides and whose decision determines status . . .").